Teamsters — LIFE — March 9, 1959

JIMMY HOFFA has police escort which Jimmy says is "maybe as long as your arm," but he escaped subpoenas from an earlier congressional investigation.

BAD DAYS FOR DAVE BECK

As the first days of testimony were being taken, the Teamsters' president Dave Beck was still missing tantalizingly out of subpoena's reach in Europe. Under Beck, who became national president in 1952, the Teamsters had reached a peak membership of 1.3 million and accumulated a $20 million treasury. As the union flourished so had Beck. Its grateful members had bought and provided him with a palatial home in Seattle. His own investments in real estate and private business have made him independently wealthy. (Last year he sold properties worth $500,000.)

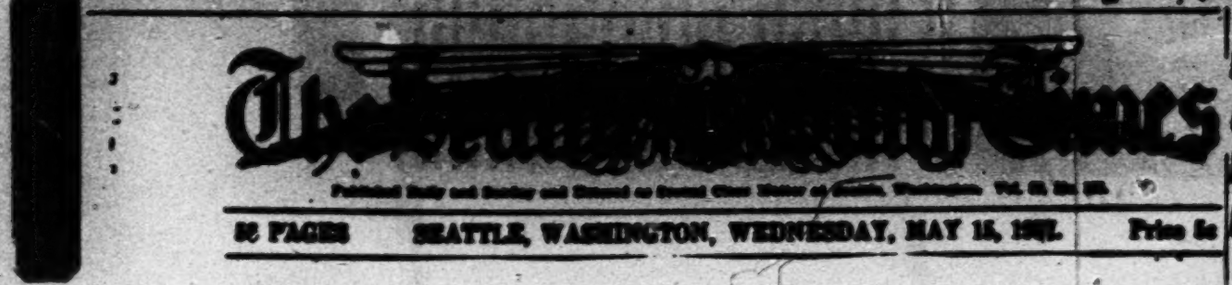
But as Dave Beck has grown older, two men have sought eagerly to succeed him. One was Beck's own successor and protégé in the Northwest, Frank Brewster (page 38). The other was Jimmy Hoffa, the hard-riding boss of the Teamsters Central States Conference. Though Hoffa has often been the target for accusations he has never been stuck with a major scandal. With Brewster involved in the Senate committee testimony Hoffa could afford to smile— he was obviously the man to beat for the Teamsters' presidency in the union elections coming up next September.

[fol. 2014]

BECK APPARENTLY STOLE $300,000 FROM UNION, SAYS PROBE AIDE

NIGHT SPORTS FINAL

Teamsters' Broker Netted $1,000,000



Times

32 PAGES SEATTLE, WASHINGTON, WEDNESDAY, MAY 15, 1957. Price 5c

Newell Made Big Profit From Union In 4 Years

By [redacted]
Times Staff Reporter

WASHINGTON, May 15— George C. Newell of Seattle received more than $1,000,000 in the past four years in commissions as broker for Teamsters' Union health-and-welfare, pension and life-insurance plans policies, the Senate Rackets Investigating Committee disclosed today.

Other highlights of Newell's 40 minutes on the witness stand:

(Column 1)

Teamsters' Insurance Underwriter Tells Of Loan at Low Interest

Labor Probe at a Glance:

Robert Kennedy, counsel for the Senate Rackets Investigating Committee, said it would appear that $300,000 in payments which Dave Beck "borrowed" from the Teamsters originally was "stolen." (See below.)

George C. Newell, Seattle insurance broker, handled in premiums $1,000,000 in the past four years from Teamster [illegible]. (Column 4.)

The committee was told Newell's commissions should have been one-tenth of 1 per cent instead of the 2 per cent he collected. (Page 4.)

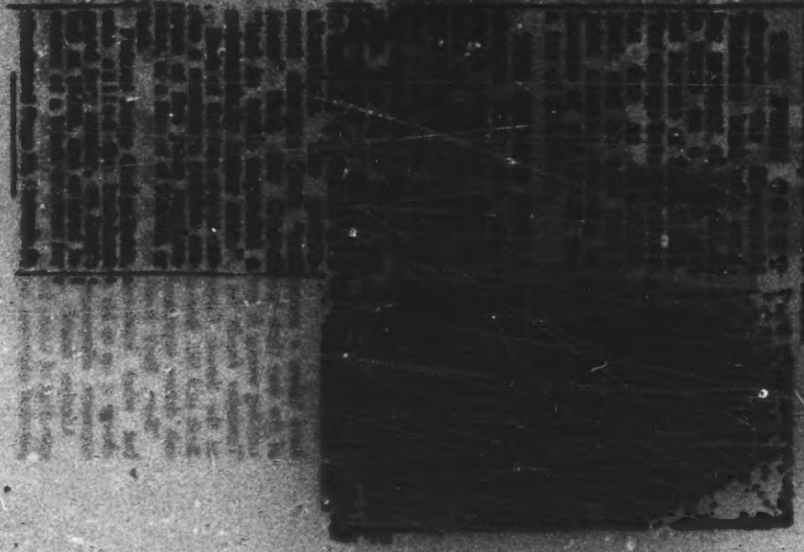
Beck procured the Columbia Film Co. of Seattle from getting a loan to buy the building from Beck, because Beck wanted his

THE WEATHER

Seattle Post-Intelligencer

6AM Final

Beck's Arrest Due Today In U.S. Tax Evasion Case



Accused On 2 Counts

Seattle Post-Intelligencer
4 Tues., May 21, 1957

McClellan Lays 'Many Criminal' Acts To Beck

WASHINGTON, May 21—(UP)—Senate Rackets Committee Chairman John L. McClellan (D., Ark.), said today he believes Teamsters Union President Dave Beck has "committed many criminal offenses."

McClellan made the statement [illegible] in an investigation of Beck.

Replying to ACLU Director Patrick Murphy Malin's complaint, McClellan made public a letter saying that as committee chairman he has "the right to express my views regarding testimony developed before the committee." He added:

"That is a 'vital liberty' I have not surrendered and do not intend to relinquish."

MALIN HAD contended that McClellan's description of Beck's use of union funds as "theft" raised a "disturbing question" of whether the committee had the right to convict a man before he is tried, McClellan said.

"May I say that the Committee has not convicted Mr. Beck of any crime, although it is my belief that he has committed many criminal offenses."

The Senator declared that "as an American citizen, as a member of Congress and as Chairman of the Senate Select Committee" he has the right to comment on the case.

[fol. 2113] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR KING COUNTY

No. 30967

STATE OF WASHINGTON, Plaintiff,

vs.

DAVID D. BECK, also known as Dave Beck, Defendant.

MOTION FOR CHANGE OF VENUE—Filed October 3, 1957

Now Comes the defendant, David D. Beck, also known as Dave Beck, by and through his attorney, Charles S. Burdell, and respectfully moves that the venue of the aforesaid action be transferred and removed from King County, State of Washington, to Whatcom County, State of Washington or Snohomish County, State of Washington, on the ground that it is and will be impossible for said defendant to obtain a fair, impartial trial in King County by reason of hostility and prejudice against the defendant existing among and throughout the population of King County.

This motion is based on the files and records herein and on the affidavit of Charles S. Burdell attached hereto and made a part hereof.

Charles S. Burdell, Attorneys for Defendant.

[fol. 2114] [File endorsement omitted]

No. 30967

AFFIDAVIT IN SUPPORT OF MOTION FOR CHANGE OF VENUE —Filed October 4, 1957

State of Washington,
County of King, ss.:

Charles S. Burdell, being first duly sworn, on oath, deposes and says:

That he is one of the attorneys for the defendant herein; that he has previously filed affidavits and exhibits in this case illustrating and referring to newspaper reports and other publicity media which have resulted in hostility and prejudice towards the defendant herein among and throughout the population of King County, State of Washington.

That affiant is advised and believes, and therefore avers, that similar publicity has been circulated and distributed throughout the State of Washington, and throughout the United States, and that there exists throughout said State and throughout the United States an attitude and atmosphere of extreme hostility and prejudice towards the defendant, but affiant is further advised and believes, and therefore avers, that such hostility and prejudice is less extreme and less intense in the counties of Whatcom and Snohomish, State of Washington, because there is only one television station located in Whatcom County, and none located in Snohomish County, and that television signals from stations located in King County reach a smaller proportion of the communities of Whatcom and Snohomish Counties than of King County; that newspapers published [fol. 2115] in King County have emphasized and prominently displayed newspaper reports of an adverse and disparaging nature to a greater degree than have newspapers published in Snohomish County and Whatcom County.

That affiant has observed and is advised, and therefore avers, that jury panels selected in King County, if not invariably, include employees of the Boeing Airplane Company; that within recent years there has been a bit-

ter jurisdictional dispute between the International Brotherhood of Teamsters and Aeromechanics Union concerning the right to represent employees of the aforesaid company; that affiant is advised and believes, and therefore avers, that said dispute has resulted in an attitude of bitterness, prejudice and hostility among employees of the aforesaid Boeing Airplane Company against officers and representatives of the International Brotherhood of Teamsters, including the defendant herein.

That in view of the foregoing circumstances, and other exhibits and affidavits on file in the above entitled case, affiant believes and therefore avers that although an attitude of hostility and prejudice against the defendant exists throughout the State, such attitude is less extreme and intense in Whatcom County and Snohomish County.

Charles S. Burdell

Subscribed and sworn to before me this 3rd day of October, 1957.

Donald McL. Davidson, Notary Public in and for the State of Washington, residing at Seattle.

[fol. 2115a] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 2125] [File endorsement omitted]

[Handwritten notation—Service of copy in Case 30966 waived—Charles O. Carroll, Prosecuting Attorney, By Charles Z. Smith, Deputy Pros. Atty.]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR KING COUNTY

No. 30967

STATE OF WASHINGTON, Plaintiff,

vs.

DAVID D. BECK, a/k/a DAVE BECK, Defendant.

No. 30966

STATE OF WASHINGTON, Plaintiff,

vs.

DAVE BECK, JR., Defendant.

AFFIDAVIT IN SUPPORT OF MOTION TO SET ASIDE AND DISMISS INDICTMENT—Filed October 18, 1957

State of Washington,
County of King, ss.:

Charles S. Burdell, being first duly sworn on oath, deposes and says that:

He is one of the attorneys for David D. Beck, also known as Dave Beck, and Dave Beck, Jr., defendants in the above entitled cases; and that he makes this affidavit in support of the motion of the aforesaid defendants to set aside and dismiss the indictments in the above entitled cases.

On or about February 26, 1957, a committee of the United States Senate commenced to conduct public hearings allegedly involving a relationship between the International Brotherhood of Teamsters and certain of its affiliated and subsidiary organizations, and certain alleged racketeers [fol. 2126] and criminal elements at Portland, Oregon;

Thereafter, continually until through September, 1957, the aforesaid committee held and conducted investigations and public hearings purportedly relating to alleged improper, dishonest and fraudulent activities by and among labor union officers.

In the course of the aforesaid hearings, many accusations of an adverse, disparaging and denunciatory nature were made against the defendants herein, and particularly against the defendant Dave Beck. Some of the accusations were made by members of the aforesaid United States Senate Committee, including particularly its chairman, Senator John McClellan, and by its chief counsel, Robert

Kennedy; and in the course of said hearings, the aforesaid chairman issued and published a list of 52 specifications of alleged misconduct on the part of the defendant Dave Beck. Included also among the aforesaid accusations reported to have been made by the aforesaid chairman was the charge that the defendant Dave Beck "stole" several hundreds of thousands of dollars from the International Brotherhood of Teamsters.

The aforesaid accusations made by the United States Senate Committee were based upon alleged "evidence" and "testimony," some of which was elicited in public in the course of the aforesaid proceedings, but none of which was subject to cross-examination by the defendants, or either of them, and none of which was subject to the rules of evidence normally applicable in judicial proceedings in courts of the United States or the State of Washington.

[fol. 2127] During the aforesaid period, from February 26, 1957, throughout the month of September, 1957, representatives of the aforesaid United States Senate Committee, including particularly the chairman and chief counsel thereof, issued and published to the press and to other news media many statements and accusations of a denunciatory nature toward these defendants, many of which were not an integral part of the investigation or hearings of the aforesaid committee or necessary to its conduct or functions; and representatives of the said committee assisted, cooperated and conferred with law enforcement agencies of the State of Washington with respect to matters exclusively within the jurisdiction of said state, and otherwise engaged in conduct not necessary to or a part of the purpose and function of the aforesaid committee, and all of which were designed, intended and permitted to be circulated, by various publicity media, throughout the United States, and particularly throughout the State of Washington, and to create, and which did create, an attitude of intense and extreme bias, prejudice and hostility toward these defendants within the jurisdiction of this Court and elsewhere throughout the United States.

The effect and result of the aforesaid conduct is partially illustrated and demonstrated in a compilation of

newspaper reports and articles referred to hereinafter. Included among such conduct are the following, among other instances:

Affiant is advised and believes, and therefore avers, that the chief counsel of the aforesaid Senate Committee, on or [fol. 2128] about April 11, 1957, conferred with Charles O. Carroll, prosecuting attorney in and for King County, State of Washington.

Affiant is advised and believes, and therefore avers, that on or about April 12, 1957, the chief counsel of the aforesaid Senate Committee reported or stated to Governor Albert Rosellini that prosecution of officers of the International Brotherhood of Teamsters must be based upon state law because there was no applicable Federal law.

Affiant is advised and believes, and therefore avers, that on or about April 14, 1957, the chief counsel of the aforesaid Committee and Charles O. Carroll, the prosecuting attorney in and for King County, State of Washington, conferred by telephone concerning obtaining a transcript of the hearings of the aforesaid Senate Committee and concerning the possibility of an investigation under state laws of officers of the International Brotherhood of Teamsters; and on or about April 14, 1957 the prosecuting attorney of King County, State of Washington is reported in the Seattle Times to have stated to a representative or representatives of said newspaper that he discussed with the aforesaid chief counsel of the Senate Committee whether or not state action involving the defendant herein was advisable.

Affiant is advised and believes, and therefore avers, that on or about April 14, 1957, a conference was held between Charles Smith, a deputy prosecuting attorney in and for King County, and Carmen Bellino, an investigator for the aforesaid Senate Committee.

[fol. 2129] Affiant is advised and believes, and therefore avers, that on or about April 14, 1957, the chief counsel of the aforesaid Senate Committee stated that documentary evidence concerning officers of the International Brother-

hood of Teamsters would be furnished to the prosecuting attorney in and for King County, State of Washington.

On or about April 26, 1957, the chief counsel of the aforesaid Senate Committee stated that the Committee stated that the Committee would assist the grand jury sitting in and for King County, State of Washington; and the chief counsel of the aforesaid Senate Committee is reported to have stated that he had confidence in the prosecuting attorney in and for King County.

Affiant is advised and believes, and therefore avers, that on or about May 16, 1957, the chief counsel of the aforesaid Senate Committee and Senator John Kennedy, a member of said committee, made comments concerning the absence of said statutes relating to the embezzlement of union funds and concerning the statute of limitations applicable in the State of Washington with respect to the crime of embezzlement.

Affiant is advised and believes, and therefore avers, that on or about June 23, 1957, Charles O. Carroll, the prosecuting attorney in and for the County of King, State of Washington, stated that the statute of limitations in the State of Washington prevented prosecutions based upon the investigations of the aforesaid Senate Committee.

On or about June 3, 1957 representatives or alleged representatives of the prosecuting attorney in and for King County stated to representatives of newspapers that [fol. 2130] defendant Dave Beck, Jr. was given an opportunity of explaining events which had previously been submitted to the grand jury, but that he declined the privilege of explaining and was excused by the grand jury.

On or about July 10, 1957, the prosecuting attorney in and for King County stated to representatives of the press that defendant Dave Beck, Sr. testified freely before the grand jury but that his testimony was limited and confined as to subject matter.

At the outset of his appearance before the aforesaid Senate Committee on March 26, 1957, the defendant Dave Beck was accompanied by counsel; and upon advice of his counsel, the said defendant refused to respond to many questions, asserting the privilege guaranteed to him by

the Fifth Amendment to the Constitution of the United States. In asserting said privilege, the defendant explicitly stated to the Committee that his refusal to answer these questions was based upon nation-wide newspaper, radio and television accounts of the proceedings and upon proposed criminal actions against him for alleged violations of Federal laws. Nevertheless, after being so informed, the aforesaid United States Senate Committee repeatedly and continuously, during the course of the proceedings, posed questions to the defendant Dave Beck, which, upon advice of counsel, he refused to answer. The said committee caused or permitted these proceedings to be televised and broadcast by and through television and radio networks throughout the United States and said telecasts and broadcasts were transmitted over and by television and radio stations in Seattle, Washington, and were observed and heard by large portions of the popula-
[fol. 2131] tion within the jurisdiction of this Court.

On May 2, 1957, a grand jury, acting in and for the United States District Court for the Western District of Washington, Southern Division, returned an indictment against the defendant Dave Beck in two counts, charging violation of Federal income tax laws.

On or about May 8, 1957, the defendant Dave Beck appeared for a second time before the aforesaid committee, accompanied by his attorney. At the outset of his hearings, the said attorney addressed the committee as follows:

> "On May 2 of this year, this witness was indicted by a Federal grand jury, sitting in the Western District of Washington, for income-tax evasion. That indictment is now pending at this moment, and trial date has not yet been set, but an early trial is expected.
>
> "I have canvassed the situation very carefully in the last few days since Mr. Beck retained me, and I want to call the attention of the committee that it is my belief and conviction that never before has a witness been called before a congressional committee who has been under indictment and interrogated about matters which can be possibily germane to the indictment.

"Now, if Mr. Beck is interrogated today about any financial transaction whatsoever, or tomorrow, or whenever the committee may recall him, those financial transactions must of necessity be relevant and germane to the indictment in Washington, because the tax case out there, Mr. Chairman, was made on a net worth basis, and there may be income which is prorated back over the years to the year 1950 which is the taxable year in question.

"Now, in the light of that fact, Mr. Chairman, I am going to formally request that the appearance of this witness be deferred until such time as that tax case is adjudicated, because he finds himself at this moment spiked on the horns of a dilemma.

[fol. 2132] "If he answers questions about financial transactions, he is, in effect giving the Government a pretrial discovery deposition before his trial. He is giving them the benefit of all of the evidence that may be relevant to his defense.

"On the other hand, if he seeks refuge in the Fifth Amendment, under recent decisions, that fact can be shown against him when and if he takes the stand in his tax case in Washington.

"Now, I think that I should call this to the attention of the committee at the very outset. I think the Government must make an educated choice here. It must decide whether the tax case is more important or whether this hearing of this witness is important.

"Because, under the decisions, especially in the *Delaney* case in the First Circuit, where there was a comparable situation, the First Circuit Court of Appeals reversed the conviction against Delaney and held that the Government could not at once proceed in the judicial system by indictment and at the same time hold open hearings on matters relevant to the indictment.

"In the *Delaney* case, I hasten to call your attention to the fact, Mr. Chairman, Delaney was not called before the King Committee, but witnesses were called after his indictment concerning financial transactions.

"I say these things so that the committee will understand the position we are taking, because I think

candor requires me to say that I propose to recommend to counsel who handles the tax case in the Federal District Court in Washington that full exploitation be made of the defendant's rights under the *Delaney* decision.

"Secondly, I must say to you, Mr. Chairman, that if you do not defer this hearing that I must advise this witness to refuse to answer any questions, on the basis of the Fifth Amendment, which I deem to be relevant in any way to the matter pending in the Federal District Court in Washington.

"My formal request, Mr. Chairman, is that you defer his appearance until such time as his tax matter is adjudicated. . . "

On or about June 4, 1957, Dave Beck, Jr., in response to subpoena, appeared before the aforesaid United States Senate Committee and was accompanied by counsel. The [fol. 2133] said defendant, upon advice of his counsel, asserted the privilege guaranteed to him by the Fifth Amendment of the Constitution of the United States. At the conclusion of the session at which said defendant appeared, members of the committee publicly stated as follows:

"The Chairman: If there is nothing else, the Chair would like to make this observation: I think on the Fifth Amendment that our founding fathers, I think in adopting it, had a noble purpose and a right purpose. I doubt if they ever conceived or could envision that the time would come when such flagrant abuse would be made of it as has been made during the course of these proceedings since this committee started public hearings, and particularly the demonstration of the abuse of it made here today.

"The chair has asked the witnesses, and other members of the committee and chief counsel have asked the witnesses, these questions, that apparently, and as I honestly believe, a truthful answer thereto could not possibly, in any way, come near, might, or otherwise, towards incriminating the witnesses.

"I do not believe the Fifth Amendment was intended as a shield and as a protection for criminals. It was to protect the innocent.

"I do not believe—and the Chair may be wrong, but I do not believe—that capricious use of the Fifth Amendment, when a witness says an answer might tend to incriminate him, I do not believe that he is entitled to invoke the Fifth Amendment unless he can also state on oath, and he is on oath when he testifies, without perjuring himself, that he honestly believes that if he answered the question truthfully the truthful answer might tend to incriminate him.

"If that can be done, I think we have to try to find out in this country, for the safety of our society, for the protection of human rights and human dignity, I think we have to find out—and I know of no way to find out except to place this situation, this record, before a court to determine even if it has to go to the highest court in the land.

"Therefore, the Chair is going to order, with the permission of the other members of the committee, order and direct, the staff to immediately prepare contempt proceedings against these two witnesses.

[fol. 2134] "If you are right in the position, you have taken here today, and the courts finally sustain your position, then America faces a great danger. Law enforcement can break down all over this country in every process, every judicial process, every investigating process, every quasi-judicial process.

"I think this is vital, this issue is vital, and it must be settled.

"I regret to have taken that position, but this committee, in my judgment, would be derelict in its duty if it did not so recommend to the Senate, and the Senate would be derelict in its duty if it did not vote contempt proceedings against you. The committee, therefore, will proceed accordingly.

"Senator Mundt: Mr. Chairman, speaking for the Republican side of this committee, I would like to associate myself completely and emphatically with what

the Chairman has just said in the committee room this morning, in the presence of these witnesses.

"I am perfectly confident that the committee will vote the contempt citation that the Chair has recommended, and I am equally confident that the United States Senate will support this motion when it comes to the floor of the Senate.

"I think the time is long past when we should have from the judiciary of the United States a clear-cut decision as to whether or not witnesses can come before our committee and utilize the Fifth Amendment in a completely irresponsible, frivolous and capricious manner. There is not anybody in the committee room, there is not anybody listening to these proceedings on the radio, who would doubt the fact that some of the responses we have had from these witnesses and from the other witnesses in utilizing the Fifth Amendment are efforts to deny information to the committee which, if provided, could not conceivably incriminate the witnesses utilizing the Fifth Amendment.

"I am confident our Constitutional forefathers never had that in mind. I am confident that the Legislative Branch of the Government and the people of America, if the courts rule that anybody can use the Fifth Amendment for any answer, without any basis in fact of incrimination, the people and the Congress have the power and the means, and can find the methods, for circumscribing that kind of frivolous use of the Fifth Amendment.

[fol. 2135] "I say that despite the discouraging decision of the Supreme Court yesterday, when it gave a very severe setback to law and order and decency in this country by requiring that the law enforcement officials of the Federal Government disclose their secret files, their means of operation, and their methods of procedure, in dealing with Communists, subversives, espionage agents, and other criminals.

"Obviously, if we are going to continue to make easy the path of the wrong-doer, and to make impossible the procedures of law enforcement officials, Congress must step in and initiate the action which may have to

ultimately be supported by the country as a whole through some kind of Constitutional amendment.

"I am confident that a country as strong as ours is not to be denied the capacity and the procedures and the powers required for its own self-interest and for its own security.

"When you set up barriers of all kinds of legal technicalities, and Supreme Court decisions, which play into the hands of kidnappers and conspirators, play into the hands of bank robbers, counterfeiters, Communists and espionage agents, I think the time is here when Congress has to act affirmatively to protect America against that kind of interpretation of the law, and that kind of use of the Fifth Amendment. . . "

That among the proceedings which the aforesaid United States Senate Committee caused or permitted to be broadcast and televised and otherwise reported, there was included the proceedings at which Dave Beck and Dave Beck Jr., upon advice of counsel repeatedly asserted and claimed the privilege guaranteed to them by the Fifth Amendment; the said proceedings were reported, telecast and broadcast throughout the United States in newspapers and on television and radio networks, including newspapers circulated among, and upon television and radio programs observed and heard by, a large proportion of the population and community within the jurisdiction of this Court. [fol. 2136] All or most of the aforesaid events, including statements to the press by the prosecuting attorney in and for King County and by representatives of the aforesaid United States Senate Committee, have been reported prominently in newspaper and magazine articles and upon television telecasts and radio broadcasts. The compilation consisting of newspaper and magazine articles and references to television telecasts are illustrative of the adverse and denunciatory reports circulated concerning these defendants throughout the jurisdiction of this Court and elsewhere. Many of these articles were printed in the Seattle Times and in the Seattle Post-Intelligencer. Each of these newspapers has wide and general circulation

throughout the jurisdiction of this Court. The aforesaid compilation was assembled at the direction of affiant and all articles contained therein are accurate reproductions of or references to news reports.

The magazine articles contained in said compilation (with the possible exception of the magazine SIR) were selected from magazines having wide national circulation and wide and general circulation throughout the jurisdiction of this Court.

In addition to normal circulation to subscribers and other purchasers, copies of the aforesaid newspapers were prominently and regularly displayed at news-stands in Seattle and in other cities within the jurisdiction of this Court at locations where the general public would observe and read the large-type headlines printed on the first page of said newspapers.

The aforesaid compilation does not include all news- [fol. 2137] paper reports and magazine articles written and circulated concerning the defendants within the jurisdiction of this Court. The compilation is illustrative only and there were many additional and similar reports published in and circulated throughout the jurisdiction of this Court. Of the thousands of such articles and reports, affiant knows of none which suggest that opinion of the community concerning the guilt or innocence of these defendants should be reserved pending trial of the charges which have been made against them.

The proceedings of the aforesaid grand jury commenced on or about May 20, 1957; and the prosecuting attorney in and for King County designated two prominent Seattle attorneys, including a former mayor of Seattle and a vice-president of the Seattle Bar Association, to conduct or assist in the conduct of the grand jury proceedings. Considerable publicity attended the conduct of these proceedings, such publicity including reports concerning the selection of the aforesaid two attorneys, appearances before the grand jury of Dave Beck and Dave Beck, Jr., appearances of other employees of representatives of the International Brotherhood of Teamsters and its affiliated organizations, statements of the prosecuting attorney, a

request or recommendation to the United States District Judge by the Chairman of the aforesaid Senate Committee recommending a denial of an application made by Dave Beck to leave the jurisdiction of the aforesaid United States District Court; and other instances and conduct referred to herein and illustrated in the compilation of news reports referred to above.

[fol. 2138] Affiant is advised and believes, and therefore avers, that many sessions of the grand jury, during the course of which testimony was elicited, were attended and conducted by the prosecuting attorney in and for King County, and by Laurence Regal, a deputy prosecuting attorney in and for the aforesaid County and by William O. Devin and Victor Lawrence, the attorneys designated as aforesaid to appear in and conduct the aforesaid grand jury proceedings. Affiant has been advised by witnesses who appeared before said grand jury that sessions of the grand jury were conducted in an intemperate manner and that in connection with testimony relative to the subject of the indictment herein favorable to the defendants, they were expressly and impliedly charged in the presence of the grand jury with concealing facts and falsely stating facts.

The aforesaid William O. Devin and Victor Lawrence attended most or all of the sessions of the grand jury during which testimony was given. Said attorneys were designated by the prosecuting attorney to perform services in connection with this particular grand jury investigation, and for no other purpose connected with or for the office of the prosecuting attorney. There was, to affiant's knowledge, no order or appointment of the aforesaid attorneys as "special" prosecutors by the Court, and the file of the Clerk of this Court relating to the grand jury proceedings contains no such order. Affiant is advised and believes, and therefore avers, that each of the aforesaid attorneys continued to engage in the private practice of law during [fol. 2139] all or a portion of the period of their service in connection with the said grand jury proceedings. Affiant is also advised and believes, and therefore, avers that each of the aforesaid attorneys were paid for their services from a special fund appropriated or allocated by the Commis-

sioners of King County specifically for use in connection with the conduct of the proceedings of the aforesaid grand jury. Affiant is also advised and believes, and therefore avers, that upon the return of the indictments referred to hereinafter, both of said attorneys discontinued performance of any services or duties in and for the office of the prosecuting attorney.

On July 12, 1957 the aforesaid grand jury, acting in and for the County of King, State of Washington, returned an indictment against Dave Beck, consisting of one count, charging the said Dave Beck with the crime of Grand Larceny; and on the same date, said grand jury returned an indictment against Dave Beck, Jr., consisting of two counts, charging, in each count thereof, the crime of Grand Larceny.

After the return of the indictment herein, the grand jury caused to be filed in the office of the Clerk of this Court, in a file which is open to and available to the public, and which has appeared in part in newspapers of wide circulation in the Seattle area, namely the Seattle Times, dated July 12, 1957 and the Seattle Post-Intelligencer, dated July 13, 1957, a mimeographed report and recommendation signed and purportedly prepared by the members of the grand jury, and that said report and recommendation is attached hereto and made a part hereof by this reference as though set forth in full.

[fol. 2140] Both before and after the return of the indictments, the King County Prosecuting Attorney, Charles O. Carroll, issued statements to the press praising the efforts of Mr. Lawrence and Mr. Devin who were purportedly appointed as assistant prosecuting attorneys for grand jury purposes. These statements said that both had extensive private practices and had done or are now doing this work at great personal sacrifice to themselves.

Affiant is advised and believes, and therefore, avers, that in connection with the qualification, selection and impanelment of the grand jury, and at all times throughout its proceedings, no steps were taken to exclude from the grand jury any person or persons who entertained an attitude of bias, prejudice and hostility toward the

defendants by reason of knowledge of the aforesaid facts or by reason of belief or opinion gathered from the widespread circulation of publicity with respect thereto, and no steps were taken to instruct or direct the grand jury to ignore or disregard the reports circulated, as referred to above, or to disregard any attitude or opinion which they might have formed as a result thereof; except, however, affiant is advised that an oath was given to the members of the grand jury, at the time of impanelment thereof, but affiant is not presently advised as to the nature and content thereof.

Charles S. Burdell

Subscribed and sworn to before me this 17th day of October, 1957.

Virginia H. Berk, Notary Public in and for the State of Washington, residing at Seattle.

[fol. 2141]

[File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

No. 104594

IN THE MATTER OF THE KING COUNTY GRAND JURY

REPORT OF THE GRAND JURY—July 12, 1957

In the charge given to us by the Court on May 20, 1957 we were instructed to investigate the following matters:

1. The activities of the officers of the Teamster Union and affiliated unions.
2. Conduct of public officials.
3. The state and condition of the County Jail.
4. Such other matters as would be brought to our attention by the Prosecuting Attorney.

Evidence was presented to us of the following subject matter:

1. Operations of the County and City jails.
2. Collection and disbursement of office funds of County offices.
3. Contributions and disbursement of funds in connection with Initiative 198.
4. Operation and procedures of License Division of Comptrollers Office of City of Seattle.
5. Conduct of the affairs of the International Brotherhood of Teamsters, Western Conference of Teamsters, Joint Council No. 28, Joint Council No. 28 Building Association, Local 174 Teamsters Union, and the particular acts of the officers and employees of said organizations which were within the jurisdiction of King County, Washington.
6. Many letters, telephone calls and reports were received by the Grand Jury some of which were totally unrelated to the subject matter with which the Grand Jury was charged to investigate. Nevertheless each report was considered and when deemed necessary it was acted upon.

From the evidence presented, we make the following observations and recommendations:

[fol. 2142]

Jails:

The County and City jails appeared to be operated in a lawful manner and in compliance with the rules as laid down by the Superior Court.

Office Funds:

All elective County Officials were examined regarding their office funds. Most of the offices examined maintained office funds to which contributions were voluntarily made by practically all employees in varying amounts, which funds were used for charitable and

similar demands made of the office and in some instances for campaign expenses of the office candidate.

Recommendation:

It is our recommendation that all such office funds, if maintained, continue to be collected only upon a voluntary basis from employees; and that they be deposited in a separate bank account not in the name or under the control of the elected official.

Initiative 198:

The evidence presented indicated that the Teamsters Union received large sums of money from out of state to defeat Initiative 198, which appeared to be in direct violation of R.C.W. 29.79.490. On the other hand, because of the broad wording of the statute in question, other labor organizations that opposed Initiative 198 and the proponents of the Initiative technically also appeared to be in violation of this statute, even though the evidence clearly indicated that an effort was made on the part of these latter parties to comply with this statute.

Recommendation:

In view of this, we have returned no indictments in this matter, but we strongly recommend that the law be amended to make it more definitive and more practical of enforcement.

[fol. 2143]

Teamsters:

The powers granted to the President by the Constitution of the International Brotherhood of Teamsters are extremely broad. Likewise the powers granted to the President and Executive Board of the Western Conference of Teamsters are very broad. There is placed within the hands of the Chairman of the Western Conference of Teamsters with the approval of the Executive Committee the almost unlimited power to use the funds of the Western Conference of Teamsters for any purpose whatsoever. Coupled with this

sweeping grant of authority is the fact that very few, if any, meetings of the Executive Committee were ever held, and furthermore the authorization of the Executive Committee, under the terms of the Constitution of the Western Conference of Teamsters, could be obtained by telegram or telephone and without a meeting of the Executive Committee. This created a situation whereby the Chairman of the Western Conference of Teamsters had practically unlimited legal power to use the funds of the Western Conference of Teamsters in any way he saw fit.

No member of the Executive Committee or Policy Committee who testified or with whom we were able to talk would admit that the Chairman of the Western Conference of Teamsters ever used the funds of the organization without authority.

The books and records of the Western Conference of Teamsters prior to 1954, as reported by the officers of the Western Conference of Teamsters, were destroyed. The period within which a charge of embezzlement can be filed in this State is three years; [fol. 2144] consequently, all acts which occurred prior to mid-1954, even though criminal in nature, under our statute would be outlawed. Despite the fact that one of the main purposes in calling the Grand Jury was to discover the wrongful use or misappropriation of Teamster Union funds, the Grand Jury met with resistance and indifference from within the union itself.

From the evidence we were able to gather, the only indictable offenses discovered were those involving the sale of automobiles of the Western Conference of Teamsters and Joint Council No. 28 by Dave Beck and Dave Beck, Jr., and the conversion of the proceeds of such sales to their own use.

For these offenses indictments were returned.

Recommendation:

It is our recommendation that legislation be enacted which will (1) protect the property and rights of the

beneficiaries of union funds and which will require a stricter accounting of funds paid by members of a labor union and other organizations as dues, and that such officers or persons having the custody or control of such funds be held to a similar degree of accountability for such funds as corporate officers are held accountable for funds in their possession or under their control;

(2) extend the statute of limitations on offenses of the officers or persons having custody or control of such funds from three to ten years, so that the statute of limitations will be the same as for offenses by public officials;

[fol. 2145] (3) require that a periodic statement of receipts and disbursements of such funds be made and a copy thereof made available upon request by any member of such organization or beneficiary of such fund;

(4) make unlawful the use of such funds by any officer of the organization for his personal benefit.

License Department:

Evidence indicates that the City of Seattle has lost substantial sums of punch-board tax revenue. There was no credible evidence to warrant the finding of an indictment against any present or former official or employee of the City, or against any other person not already convicted. There is, however, ample evidence to indicate that the procedures used in the License Department of the Comptrollers Office in the regulation and collection of taxes on punch-boards have been lax and inadequate resulting in the loss of large sums of punch-board tax monies due the City Treasury.

Recommendation:

It is recommended that, in addition to the improvements recently adopted by the License Department, steps continue to be taken by the License Department, and such officials or bodies of the City of Seattle as

are charged with that responsibility to recover past or to forestall future loss of revenues.

Liaison Between Federal and Local Government Agencies:

There appears to be a lack of coordination between law enforcement agencies of the Federal Government and those of the State and Local Governments. Had the local enforcement agencies been advised by the [fol. 2146] Federal Internal Revenue Agency in 1953 or 1954 of the apparent misappropriation of union funds by certain union officials, proper legal action could have been taken before the Statute of Limitations ran against those offenses.

Recommendation:

It is recommended that closer liaison be maintained by the law enforcement agencies of the Federal Government with those agencies of the State and local Governments.

Grand Jury Procedures:

It is recommended that the law covering Grand Juries be studied with a view towards modernizing procedures and clarifying the powers and duties of the Grand Jury, the Prosecuting Attorney and the Court with reference to Grand Juries.

Dated this 12th day of July, 1957.

Andrew C. Dalgleish
Foreman of the Grand Jury

Russell D. Webb	Robertson Coit
C. W. Scott	Opal Hill
Alma Kottsick	Lewis W. Benson
Genevieve James	W. D. Haley
Floyd H. Raymer	Erwin M. Wallace
M. Edythe Dennis	Roy A. Gamble
George P. Ostroth	Arthur W. Hannes
Reginald E. Washington	Henry J. Brady

appeared before said Grand Jury in the course of the presentation of testimony and evidence thereto.

This motion is based upon the files and records herein, including affidavits of Charles S. Burdell and W. Wesselhoeft, relating to their information and belief concerning conduct of the Grand Jury proceedings.

Dated this 4th day of November, 1957.

Charles S. Burdell, Attorney for Defendants.

State of Washington,
County of King, ss.:

Charles S. Burdell, being first duly sworn on oath, deposes and says:

That William F. Devin and Victor D. Lawrence attended sessions of the Grand Jury prior to June 18, 1957.

That affiant is also advised and believes, and therefore avers, that the aforesaid William F. Devin and Victor D. Lawrence were engaged in the private practice of law throughout the period of time when they appeared before and performed services in connection with the Grand Jury and the Grand Jury proceedings; that affiant believes that this fact constitutes grounds for setting aside the indictment herein; that he desires to interrogate the aforesaid [fol. 2198] persons with respect to this subject.

That affiant believes that conduct which took place during the interrogation of the witnesses Jack Stratton and Fred Verschuren, Jr. before the Grand Jury constitutes grounds for dismissal or setting aside of the indictment herein, and that affiant desires to interrogate all of the witnesses named in the attached motion with respect to said conduct.

Affiant further certifies that in his opinion the testimony of the aforesaid witnesses is material to the defense in this case, with particular respect to the validity of the Grand Jury proceedings and the validity of the indictment.

Charles S. Burdell

Subscribed and sworn to before me this 4 day of November, 1957.

Virginia H. Berk, Notary Public in and for the State of Washington, residing at Seattle.

[fol. 2207]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

No. 30967

STATE OF WASHINGTON, Plaintiff,

—vs.—

DAVE BECK, SR., Defendant.

No. 30966

STATE OF WASHINGTON, Plaintiff,

—vs.—

DAVE BECK, JR., Defendant.

PROCEEDINGS BEFORE JUDGE SHORETT,
NOVEMBER 7, 1957—ON MOTIONS

The Court: Gentlemen, to avoid any misunderstanding in this case, or these two consolidated cases, I thought it best that we take them up in open court this morning and I think it proper to say that the other day we had understood that one-half day would probably be sufficient to complete these arguments. We all know we barely squeezed it into a full day and I think about the time we recessed at a quarter after 12:00, a little after noon, we were all

perhaps in a hurry to get away and there may have been some misunderstanding as to exactly what was intended. To avoid that, let us go over it a little bit now.

First, taking up the matter of the amended motion for [fol. 2208] the examination of documents. I think we are all clear now that Paragraph I of that motion, relating to the records of the Western Conference of Teamsters, Local 174, the Joint Council of Teamsters, No. 28, and the Building Association, being enumerated as subdivision 1(a), (b), (c) and (d) of that motion, were granted. The balance of that motion being II, with subdivision (a) through (w), were all denied.

Now, I understand from counsel this morning that the period of time granted by the Court, namely, one day from 9:00 o'clock in the morning to 5:00, is not regarded as sufficient to permit the type of examination required or desired and that because of the shortage of time, probably no more than two days would do the defendant any good, so that I am going to change that order and permit the defendant's examination of those particular documents contained in Paragraph I of this motion, (a) through (d), to permit the defendants or their representatives to inspect those documents from this morning at 9:00 o'clock until 5:00, and also tomorrow. During all the times of the inspection, a representative of the Prosecuting Attorney may be present.

Now, to go to the other matter which concerns the request of the defendants for a transcript of the testimony of Jack Stratton, given June 19, 1957, and the testimony of Fred Verschueren, Jr., given June 20, 1957, and again July 10, 1957. This motion was based upon Paragraph IV of the Motion to Set Aside and Dismiss the Indictment, reading in part that the proceedings of the Grand Jury, which returned the indictment, were conducted in an atmosphere of extreme bias, prejudice and hostility toward this [fol. 2209] defendant, and that said atmosphere was in part created by the Prosecuting Attorney and persons acting or claiming to act in his behalf, all of which was prejudicial to the defendant and which has denied and will continue

to deny him rights guaranteed under the XIV Amendment of the Constitution of the United States, Amendment X of the Constitution of the State of Washington, Article I, Section 3 of the Constitution of the State of Washington.

It is also based upon an earlier motion made for an inspection of the transcript regarding the testimony of all the witnesses and it is based upon an oral motion made by Mr. Burdell at the hearing for a transcript of the testimony of these witnesses and all of these motions are in turn based upon several affidavits which are in the file.

Now, coming to an analysis of the questions involved, it seems to me that it is this. Can such prejudice result to a defendant because of claimed intemperate conduct on the part of the prosecuting official before a Grand Jury that would deny the plaintiff, or the defendants, rather, any constitutional right guaranteed under the State or Federal Constitutions? Mind you, this is not one of the defendants that is testifying here. Now, these witnesses were employed by, or one of the witnesses was employed by the Teamsters Union or some affiliate of the Teamsters Union. The other witness was engaged in the garage business or worked in a garage and I have read this testimony through and find in the testimony numerous references by one or more of the prosecuting officials to the statute on perjury, to a statement of claimed disbelief of the statements or testimony made by one of the other of these witnesses.

[fol. 2210] I find no indication in this transcript that either witness was persuaded to change any part of his testimony due to any assertion made by any prosecuting officials. Now, it seems clear to me that mere statements of this kind made to a witness which did not affect his testimony, cannot in any way be taken advantage of by the defendants in a criminal case against whom an indictment was returned. The defendants' presumption of innocence which he is accorded in common with every other defendant, remains just as strong at the time of trial as it did before he was ever indicted. The fact that some witness may have examined at length, cross-examined and even assuming that any intemperate statements may have been made toward

that witness, or statement indicating disbelief in his testimony, certainly would not in my judgment be any violation of the particular defendant's rights, unless it could be further shown that the statements made by the prosecuting officials were in the nature of mental coercion which required and resulted in the witness testifying falsely to some matters.

Here we do not even have a case where the witness changed his testimony, much less that he testified to something falsely which might have resulted in an unfair or unjust indictment of the defendant who would not have been indicted in the absence of such false testimony. Now, let me give you an extreme example, which of course would never occur in America. Suppose a witness before a Grand Jury was tortured physically and as a result of that physical torture he gave false testimony which resulted in an indictment. Then I say that a defendant would have, or probably a right to have that indictment set aside, if that testimony was false. Suppose, however, that after such [fol. 2211] physical torture the witness never changed any of his testimony in any degree. Now, of course, he would have his remedy against the prosecuting officials in either a criminal or civil action but how has the defendant's rights been affected?

I think, gentlemen, I feel they were not affected in any way whatsoever. For that reason, after the inspection of this transcript, I am of the opinion that no testimony which contributed in any degree toward these indictments could possibly have been elicited as a result of any statements made by the prosecuting officials. Therefore, there has been no violation of the rights of the defendants in these cases and the motion for an inspection of the transcript of the testimony of these two witnesses will be denied. The transcripts have been prepared and will be available to the defendants in the event of any conviction and subsequent appeal, so that they may urge this ground before an appellate court. The transcripts will not be available until after the conclusion of the trials, the second trial in the Superior Court. Are there any questions?

Mr. Burdell: Not about that, your Honor. I have a question about another matter.

The Court: Yes, sir.

Mr. Burdell: One matter that we did not rule on or that the Court did not rule on was, and I think again it was because we didn't bring it to the Court's attention, was the motion which I filed, I believe Monday or Tuesday, for subpoenas to be directed toward or to these two Grand Jury witnesses, Verschueren and Stratton, and—

The Court: Pardon me just a moment.

(Off the record.)

[fol. 2212] Mr. Burdell: I made a motion for subpoenas to be directed to four persons, again in connection with this Grand Jury proceeding, or in connection with the problem of the conduct before the Grand Jury. I don't want to waive that motion. On the other hand, in view of the Court's remarks and in view of the fact the Court has read the transcript, I assume that that will be denied.

The Court: Yes, sir. That will be denied; exception allowed, so that you may make your record on that and preserve it for any possible need.

Mr. Burdell: Now, I don't think I have any other questions. I am just wondering now if I can change this order over so that it will work.

The Court: I wonder if you would talk to Mr. Smith about it and agree between you. Gentlemen, I wish to say one other thing. I brought out with me *State* vs. *Ingles* to which we referred the other day and I had meant to mention it in my oral decision here. I may say just for the record that I have considered that case and the discretion that is imposed in the Court under the authority of that case in deciding this matter. Such discretion as I have, after reading the transcript, I wish to exercise in conformity with the decision I have given.

Very well, gentlemen, thank you very much.

[fol. 2213] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR KING COUNTY

No. 30967

STATE OF WASHINGTON, Plaintiff,

vs.

DAVID D. BECK, a/k/a DAVE BECK, Defendant.

MOTION FOR CONTINUANCE—Filed November 7, 1957

Comes Now the defendant David D. Beck, also known as Dave Beck, and respectfully moves for a continuance of the trial of the above entitled case for one (1) month, or to such other time as the Court deems sufficient to allow prejudice and hostility to subside, on the ground that there continues to exist throughout the jurisdiction of this Court, as a result of hostile and adverse publicity circulated throughout said jurisdiction relative to the defendant and relative to his associates, an atmosphere of bias and prejudice so extreme that it is and will be impossible, on the date now set for trial, for the defendant to obtain and secure a fair and impartial trial.

This motion is based upon all of the files and records herein, including the affidavit of Charles S. Burdell attached hereto and made a part hereof.

Charles S. Burdell, Attorney for Defendant.

[fol. 2214]

Affidavit of Charles S. Burdell

State of Washington,
County of King, ss.:

Charles S. Burdell, being first duly sworn, on oath deposes and says:

That there is being filed herewith copies of illustrative newspaper articles relating to the defendant Dave Beck, and relating to other persons who are known or believed throughout the community to be associated with him. That these articles are a continuance of publicity of the nature and type which has been circulated about and concerning the defendants herein continually since March, 1957. That similar publicity has been circulated by means of telecasts and broadcasts. That affiant is advised and believes, and therefore avers, that articles of this type (of which the articles filed herein are illustrative only and not inclusive of all such publicity) has resulted in an attitude of extreme prejudice and hostility toward the defendant Dave Beck and the defendant Dave Beck, Jr. and that it will thereby be impossible for said defendants to secure a fair and impartial trial at the dates upon which the cases are now set for trial.

That publicity of the type referred to above has resulted from an investigation and hearing conducted by a United States Senate Committee; that representatives of said committee, including particularly Carmen Bolino and Robert Kennedy, conferred with representatives of the Prosecuting Attorney shortly prior to the commencement of the grand jury proceedings herein; and that representatives of the Prosecuting Attorney, including Victor Lawrence, [fol. 2215] conferred in Washington, D. C. with representatives of the aforesaid Senate Committee.

That affiant is also advised and believes, and therefore avers, that at least one representative of the Prosecuting Attorney, namely William Marx, conferred with representatives of the United States Internal Revenue Service at or during the course of the grand jury proceedings.

That the aforesaid hearings of the United States Senate Committee were discontinued or postponed at some time in or about the month of July, 1957; that said hearings were resumed in or about the month of October, 1957; that the resumption of said hearings, and the attendant publicity at a time so near the date now set for trial of these cases, which hearings are expected to continue to and during said trial dates, will result in continued and increased hostility and prejudice toward the defendants as averred above.

That on November 6, 1957, an order was entered denying a motion made by the defendant herein to set aside the indictment; that said motion was based upon the ground that irregularities occurred in connection with the impanelment, selection, drawing and swearing of the grand jury, and upon the ground of misconduct of the grand jury and attorneys appearing before it. That affiant is advised and believes, and therefore avers, that said irregularities may have contributed to the hostility and prejudice against the defendants as aforesaid.

* * * * * * *

[fol. 2217] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR KING COUNTY

No. 30967

STATE OF WASHINGTON,

Plaintiff,

vs.

DAVID D. BECK, a/k/a DAVE BECK,

Defendant.

EXHIBITS IN SUPPORT OF MOTIONS—Filed November 7, 1957

[Handwritten notation—Copy acknowledged, Charles Z. Smith, Deputy Pros. Atty. Nov. 7, 1957.]

In connection with the motion both Mr. Smith and I have a list of or a compilation of exhibits consisting of newspaper articles. Mine is entitled "Exhibits Filed in Support of Motion for Continuance", and I'll ask that that be filed. I assume Mr. Smith will file his in a few moments.

Now, your Honor, because of some haste in getting this matter to the court expeditiously, I haven't filed an affidavit in support of the motion, but I wonder if I could be sworn at this time and state what I do know concerning the grounds I have stated as reasons for the motion and have that, or my sworn statement, made a part of the record.

The Court: Any objection?

Mr. Smith: No objection, if this is a substitute for an affidavit which would have been filed by Mr. Burdell.

Mr. Burdell: That's what I intend it to be.

The Court: Very well. Raise your right hand.

CHARLES S. BURDELL, was duly sworn by the court and made the following statements under oath.

Mr. Burdell: Now the statements which I am about to make, your honor, are in support of the motion for con- [fol. 2251] tinuance. Referring first to paragraph one of the motion, which refers to an attitude and atmosphere of hostility, I would like to state that with reference to that reason or ground for the motion I refer primarily to newspaper articles and affidavits which have previously been filed in the court and which, I believe, have previously been considered by this court by way of sworn statement in support of that motion or that reason. I will state that my inquiries throughout the community, which, of course, have not been or have not reached the point where they could be considered anymore than a mere sampling of opinion have elicited expressions from many lawyers, at least 50, to the effect that in their opinion there does exist an atmosphere of hostility toward the defendant Dave Beck at this time, and my inquiries among lawyers since the trial of the case of Dave Beck, Jr. have elicited again, without exception, opinions from at least 20 lawyers that the attitude of hostility toward the defendant Dave Beck

had been increased and emphasized by the results of the case against Dave Beck, Jr., and particularly by the radio, television, and newspaper publicity which was attendant upon the trial of that case.

I will also say that in addition to lawyers I would say that I have talked to between 100 and 200 persons who are not lawyers and who, I believe, would represent a cross section of the persons within the community, at least persons from what we might call every social and economic level, and I can say without any exception, I have been told that in the opinion of the people to whom I have talked, it is impossible to obtain a fair trial for the [fol. 2252] defendant at this particular time.

Reason No. 1 also refers to the fact that the attitude of hostility was engendered in part by the conduct of the office of the prosecuting attorney. That refers specifically to conduct at the time of the Grand Jury proceedings, and I think that conduct has already been made a part of the record. It refers primarily to statements of representatives of the prosecuting attorney's office concerning matters connected with the Grand Jury proceedings, the effect of a statute of limitations with respect to the possibility of indicting the defendant and things of that sort. I have no reference to any conduct on the part of the prosecuting attorney, or I know of no conduct on the part of the prosecuting attorney subsequent to the Grand Jury proceedings which would have engendered any attitude of hostility toward the defendant except, of course, the conduct of the prosecuting attorney in the course of the trial of Dave Beck, Jr. which so far as I am concerned was entirely proper except for the possibility of what I might later contend or later will contend was misconduct in the course of argument. However, the matters that I have in mind there in that connection I don't believe reached the public press. Of course, many details of the trial did reach the public press and in my opinion will contribute to the attitude and atmosphere of hostility which I believe does exist.

I have probably covered point two in connection with my last remarks.

In point three, the ground stated there is that certain of the newspaper, television and radio reports relative

[fol. 2253] to the trial of the case against Dave Beck, Jr. were false and misleading and contributed to and emphasized an attitude and atmosphere of prejudice and hostility toward the defendant. I might state that at this particular time I could not state or am not prepared to state under oath that there were any false statements in the newspapers. There were I am sure, however, statements which because of the fact that they were reported out of context were without any question misleading. I have in mind particularly a headline in the Seattle Times which referred to a supposed contradiction in the testimony between Dave Beck and one Fred Verschueren, Jr., and there were a number of other headlines, which, while probably from the point of view of newspaper reporting were proper and appropriate summaries of the stories, nevertheless were unquestionably misleading in the sense that they did not report the entire proceedings or the entire testimony to which they referred.

In some of the newspaper articles which we have on file there are a number of illustrations of the type of thing that I have in mind. For example, in the Seattle Times on November 17, 1955 there was a prominent article. It is on page 27 and page 28 of the compilation which I am filing, which referred at considerable length to the alleged efforts of the sheriff's office to find a witness who turned out to be witness for the defendant. There is a reference to the fact in this paper that Mr. Regal of the prosecuting attorney's office stated in open court that he was reluctant to call this witness as a witness for the State because the prosecution could not vouch for his testimony. There was a similar statement made by Mr. Regal which was [fol. 2254] reported elsewhere in the press prominently, and the absence or alleged absence of this witness Verschueren was to my personal knowledge reported on radio and television.

This witness Verschueren was a witness for the defendant in the case against Dave Beck, Jr. Of course, it made no difference at that point so far as I know, because my advice at the present time is that the jury was properly confined and that newspaper and television and radio reports were not made available to the jury, but, of course,

the prospective jurors—undoubtedly many of them, and, again, of course, I am just stating in this connection a matter of opinion, but undoubtedly many of them saw articles of this sort, referring particularly to the efforts of the prosecution to obtain a so-called missing witness, and particularly I might point out that the statement of Mr. Regal that the prosecution would not vouch for the truth of the testimony of this witness is reported in bold letters in this article. The record already, of course, shows, and I am sure the court can take judicial knowledge of the fact that the Seattle Times is a newspaper which is prominently—

The Court: Are you still referring to this on page 27?

Mr. Burdell: Twenty-seven and 28. Mr. Regal's statement is on page 28, your honor. It is in the first paragraph of bold type.

The Court: Yes. Go ahead.

Mr. Burdell: Of course, I am sure I can state that the Seattle Times is a newspaper which is distributed with a [fol. 2255] considerable degree of circulation throughout the jurisdiction of this court.

Now, on page 27 there is further reference to this missing witness Verschueren, and again there is a statement about the fact that Mr. Regal conferred heatedly with Mr. Verschueren before today's session opened, and again 45 minutes later just before resting the State's case. Actually my information from Mr. Regal is that the conference was not a heated conversation.

In any event, again following that, there is the paragraph which states that Mr. Regal told newspaper men that he did not call Verschueren as a witness because he could not vouch for Verschueren's testimony. Verschueren, as I stated before, was a witness for the defense in the Beck Jr. case, and according to my present knowledge and plans will be required as a witness in the case against Mr. Dave Beck, Sr.

There is also testimony and reference in these newspaper articles to a so-called destruction of the books of certain of the union organizations which were involved in the Dave Beck, Jr. case and also will be involved in the Dave Beck, Sr. case. I might refer now to page 36,

again referring to this witness Verschueren, and I am now referring to an article which was on the front page of the Seattle Times on November 20, 1957 in red headlines in which it is stated that "Witness Denies Concocting a Story for the Defense of Dave Beck, Jr.", and the story to which that headline referred was on the first page of the Seattle Times and refers to the fact or quotes a question by Mr. Regal in which he states, "Isn't it true that this is a [fol. 2256] story concocted by you and Mr. Beck who answered the charges here?" Now, Mr. Regal was referring there to Mr. Beck, Sr. who is the defendant in the case which is now set for December 2.

Referring again to page 43 there is a headline in the Seattle Times, which, while it refers to Dave Beck, Jr., will, I believe, have reference and contribute to prejudice against Dave Beck, Sr. The headline is that Beck Jr. was unable to recall his activities as union organizer, and he is quoted as stating in response to a question, "I can't put my finger on any one thing", and that is the entire quote about his testimony with reference to his activities as a union organizer. In fact, of course, there was considerably more testimony than that concerning his activities as a union organizer, and while in the opinion of the reporter or the person who wrote the headlines with respect to this particular article he may, in their opinion, have been unable to recall his activities as a union organizer, as a matter of fact he testified at substantial length concerning it and testified at substantial more length than the one sentence which is quoted in the newspaper.

Then, of course, on page 47 there is a front page article which appeared in the Seattle Post-Intelligencer another newspaper which is circulated to a substantial degree throughout the jurisdiction of the court—

The Court: What page did you mention?

Mr. Burdell: Forty-seven, your honor. On page 47 the defendant in the present case is quoted as saying that in the Dave Beck Jr. case if anyone did anything wrong it [fol. 2257] was he, that is the man who was or is the defendant in the case now set for December 2, and that article

was, as I say, on the front page under prominent headlines.

On page 57 there is an article which appeared in the Seattle Times, and I am not sure but I believe this was on the front page of the Seattle Times, which states in bold headlines a statement attributed to Mr. Smith here beside me in his closing argument, in which Mr. Smith argued to the jury that the Becks had quote obviously contrived unquote the story to explain away why the union did not receive the proceeds from the sale. Of course, that wasn't testimony. That was Mr. Smith's argument.

On page 60 there is another article which appeared in the Seattle Times under a prominent headline which says, "Embezzlement Found in Sales of Union Autos", and the article there refers in general to the trial of Dave Beck, Jr., but refers from time to time through the article to Dave Beck, Sr. and the position which Dave Beck, Sr. was alleged to have played, or his alleged connection with the so-called embezzlement by Dave Beck, Jr., and in the course of that article there is a statement that several discrepancies between the testimony of Dave Beck, Sr. and Verschueren were noted or noticed apparently by the reporter.

Now, I have only referred to a few of the articles. I notice in one or two of the articles which Mr. Smith has filed there are also copies of articles which certainly will contribute to the hostility against the defendant.

On the second page of his compilation, for example, there [fol. 2258] is an article which appeared in the Seattle Post-Intelligencer on Saturday, November 23, 1957, with the heading, "Beck Plans Big Member Campaign". That refers to the defendant who is now scheduled for trial on December 2. At the beginning of the article it states, "Boasting that 'money is nothing to us', Dave Beck Friday announced", etc. Of course, in the opinion of the writer it may have been a boast. Whether or not it actually was a boast, of course, is clearly a matter of opinion, but in any event it was reported to the public as a boast.

Again on page three of Mr. Smith's compilation, there is a reference to a fact that Mr. Beck and his associates may sell stock in the Grosvenor House, which is a large

apartment building in Seattle, and the story reports the building to be worth $4,200,000.00 and indicating that the defendant Beck owns 19 percent of the corporate stock of that large apartment house.

Also on page six of the compilation put together by Mr. Smith there is a headline indicating that teamster aides seek to raise $150,000.00 legal defense fund, and the story goes on—as you read the story you find that this is an announcement made by vice president-elect of the Teamster's Union and not any announcement made by Mr. Beck, the defendant herein, but, of course, the headlines indicate or would indicate to the public that the teamsters, including Mr. Beck, who is the president of the union, may have some large amount of money available for the defense raised somehow or other through the union. I am glad I am under oath. I can state to my knowledge there is no legal defense fund available for my services. My services are being paid [fol. 2259] for by Mr. Beck personally, and I have no knowledge of any defense fund, and so far as I know, no defense fund will ever be raised or is planned to be raised for the payment of any legal fees to be paid by Mr. Beck, Sr., in connection with my services in the case which is set for December 2.

On page two of our motion one of the grounds stated is that the proceedings in connection with the trial of the defendant Dave Beck, Jr., were prominently displayed on television and broadcast on radio. That ground is, of course, true. I saw many of the broadcasts myself personally and learned by reports from others of other broadcasts and reports. Dave Beck, Sr., was mentioned in the course of those reports, and references to his testimony were made during the course of those television and radio broadcast reports, and, of course, the verdict of the jury was reported on television and broadcast as well on radio, and I believe that this particular compilation of newspaper reports which I am submitting about the trial of Dave Beck, Jr., will indicate quite clearly that from a reading and examination of the stories one would draw the conclusion that Dave Beck, Sr., was at fault or committed some sort of misconduct which was part of or connected with the case against Dave Beck, Jr.

Also on ground number four on page two of the motion we have pointed out, and this is again something that I know, have personal knowledge of, that approximately 60 jurors of the present panel of the court, which is—

The Court: Mr. Pilgrim.

Mr. Burdell: (Continuing)—approximately 60 members of the present panel of the court were selected and sent to [fol. 2260] Judge Revelle's courtroom for examination as prospective jurors in the case against Dave Beck, Sr.

The Court: The reason I called Mr. Pilgrim back, I know we sent 40 initially. Is that statement correct that there was a total of 60, Mr. Pilgrim? Do you recall?

Mr. Pilgrim: No, I believe they just used the 40, your honor.

Mr. Burdell: Well, Mr. Regal and I have discussed this.

The Court: Did we ever send any more after the first 40?

Mr. Pilgrim: No, I don't believe we did, your honor.

The Court: I don't recall that we did.

Mr. Burdell: If I am mistaken about that, I'll say Mr. Regal is also mistaken, because he and I discussed it and he is also mistaken. Then it would be 40. I would have to correct that. Oh, yes, and maybe this is where I got the information too. I am sure I discussed it with Mr. Regal, but in the newspaper, in the Seattle Times on Wednesday, November 13, page 18 of our compilation, the report is that 60 were sent to Judge Revelle's court for selection of the jury.

The Court: Yes. I saw that at the time in the Times, and knowing that they are almost always correct, I knew at the moment I read that in the Times that as of that moment they were not correct, that the number was 40.

Mr. Burdell: Well, possibly my confidence in them is the thing that led me to state that there were 60 sent to [fol. 2261] the courtroom.

In any event 40 were sent among the panel or selected from the panel which will presumably include prospective jurors in the case against Dave Beck, Sr. All of those persons, many of whom of course were not selected as jurors, some of whom were examined on voir dire and excused, were present when questions were asked which elicited the fact that Mr. Beck, Sr., had been under attack or under

a charge by a United States Senate Committee. Some of the questions elicited the fact that Mr. Beck had asserted the Fifth Amendment on one or two occasions in connnection with his testimony before the United States Senate Committee. Other questions elicited certain other statements referring to hostile opinion or hostile feelings toward Mr. Beck, Sr. Of course, we do not know whether or not for sure—I have been advised so by other attorneys—that during some of the voir dire examination there were jurors in the courtroom who were not called, that is who were not among the 40 who were sent down, but I didn't recognize any of them myself and would only be able to say that I had been told that.

On page No. 3 in paragraph five the reason there stated is that the trial of the case against Dave Beck, Jr., involved much testimony which will be and constitute a part of the case against Dave Beck, Sr. That I know to be a fact according to my present plans, and I believe that is probably true to some degree in the prosecution case, and, of course, the remainder of that paragraph indicates that the testimony to which I have reference was reported prominently in the newspapers, and I think it is quite clear [fol. 2262] that the reports of the testimony were certainly extremely prejudicial to the defendant Beck, Sr.

In addition to those matters, as the court may know, there is now pending in the United States District Court for the District of Columbia an action brought by I believe 13 members of the International Brotherhood of Teamsters, a class action, an action purportedly brought on behalf of all the membership of the United Brotherhood of Teamsters. It is an action in which it is sought to enjoin the President-elect, James Hoffa, from taking office as president, the action being based on the alleged grounds that the election at the convention in Miami recently was improper or illegal with ineligible delegates and things of that sort. That action is also set, that is the action in the District of Columbia, is also set for trial on December 2, the same date that the defendant is set for trial in this court. The action in Washington, D. C. was set on December 2 not by any knowledge on my part, or, as a matter of fact, I have nothing to do with that action, nor was it set by any motion or request or agreement of Mr. Edward

Bennett Williams, who is the counsel for the International Brotherhood of Teamsters in Washington in that case. On the contrary it was set for trial by mandate of the United States Circuit Court of Appeals. This, by the way, is information which I have received from Mr. Edward Bennett Williams yesterday by telephone and which I confirmed again this morning from him by telephone.

He stated to me on the telephone on both occasions that the case being one of equitable jurisdiction and involving what we would call preliminary proceedings in equity, [fol. 2263] the case had been expedited and had been set by mandate of the circuit court of appeals and could not be changed.

Mr. Beck, Sr. is a party to that action. He is President of the union; that is he is the current president of the union. He is an indispensable witness on behalf of the International Brotherhood of Teamsters, and I am also advised that the plaintiffs expect that he will be in Washington, D. C. and that the plaintiffs expect to call him as a witness. That case in Washington, D. C. was originally set for trial, I believe, in the latter part of November, and in a conversation at or about the time it was originally set, I advised Mr. Williams that I thought Mr. Beck could probably be in Washington the latter part of November. That was in connection with some sort of an arrangement which was being made to have all of the defendants and the parties and the indispensable witnesses in Washington by agreement of both parties. The case was later continued, I was advised by Mr. Williams, from late November until December 2, because of illness of some of the attorneys, and Mr. Williams advises me that the case at this point cannot be changed, that is the trial date.

Of course, that case, I might point out, is brought on behalf of all of the members of the International Brotherhood of Teamsters, and it involves, therefore, of course, many, many persons as well as the nominal plaintiffs, and I understand that several attorneys are involved in the case. I know that there are two attorneys representing the 13 nominal plaintiffs. I know that there are at least two representing the International Brotherhood of Team- [fol. 2264] sters. How many other attorneys there are in the case I do not know.

Of course, I might point out that by reason of the fact that Mr. Beck is President of the union, and by reason of the fact that his case in Washington, D. C. has been filed, it has been necessary for him to spend considerable time in connection with his duties and in preparation of the case in Washington, D. C., and I can state to the court that he has had to spend much time there in connection with the preparation of that case when I would have expected him and did expect him to be in Seattle to assist me in the preparation of the case which is now set for December 2. As a matter of fact he is in Washington right now when I had naturally thought, and I believe without presuming too much, that I could expect to spend time with Mr. Beck between the completion of the trial against Dave Beck, Jr., and December 2.

The trial against Dave Beck, Jr., was completed at 9:00 o'clock last Saturday, and Mr. Beck, in order to attend to these matters in Washington—several matters—but particularly in order to attend to this case which is set for December 2 there, left Seattle last Monday morning, that is the Monday after the Saturday on which the jury came in on the Jr. case, and he is still there, and I have not had the time, not had an opportunity to consult with him during this period of time when I should have been consulting with him.

I will say that by virtue of that fact and by virtue of the rather extended period of time which the Dave Beck, Jr., case took, and I believe it took longer than we expected it [fol. 2265] to take—I believe we were talking about, as I recall, possibly a substantial period of time to get a jury, but then about a three-day trial. Actually the entire trial lasted, I think, at least 10 days including one Saturday. Am I about correct on that, Mr. Smith?

Mr. Smith: Yes.

Mr. Burdell: Including two Saturdays I should say. That would be including the Saturday that the case was finally submitted to the jury, but by reason of those facts—well, I should also add this: That I am attorney for Mr. Beck in two cases involving violations of the federal income tax laws in the United States District Court in Tacoma. Those cases have required me to spend considerable time in connection with motions and other preliminary matters. Of

course, I think the court understands that there is always more to be done in connection with those things than one anticipates, and while I will say I have certainly been diligent in connection with the matter, and I have employed as much assistance as I could possibly get, taking into consideration the necessity of getting someone who is familiar with the basic background, I have definitely not, in view of the absence of Mr. Beck in these other matters, had an opportunity to prepare this case in the manner that it should be prepared to present a fair and competent defense and the type of a defense that the defendant is entitled to.

Undoubtedly this is a matter of opinion, but I believe I can state it almost as a fact, that there will be legal issues involved in the case against the defendant which were also involved in the case against Dave Beck, Jr. I am also sure [fol. 2266] —this is a matter of opinion, but I think I can almost state this as a fact—that certain of the testimony which was involved in the trial of Dave Beck, Jr., will be involved in the trial of Dave Beck, Sr., and I think for the benefit of both the State and the defendant it would be helpful and it would expedite the trial if we could obtain a transcript of that testimony. I may say I have ordered a transcript of that testimony.

In conclusion, I think I have pointed this out, but again it is stated as a ground for our motion, on page five, paragraph 14—this I can state partly as a matter of opinion, but also as a matter of fact based upon an examination of these newspaper compilations—that certain of the testimony given in the case against Dave Beck, Jr., that is the testimony given by the defendant, must have been disbelieved by the jury in view of the verdict, and that testimony and the result and the indication that the testimony was disbelieved is made apparent in these newspaper compilations, and for this reason, if the court please, I request—I haven't stated the period of time for which I wish a continuance, but in view of the hostility, I believe that the case should be continued for at least a period of months, three months at least, in view of the situation now existing.

I might say that while I am still under oath, I am now expressing an opinion that it seems to me that in view of this rather striking publicity which we find illustrations of here it would be hard to conclude, I think, that the defen-

dant in this case would approach this trial with anything but a terrific attitude of prejudice against him, probably [fol. 2267] one at this point more extreme than has ever existed, and certainly that attitude has existed considerably and emphatically throughout the past three months, but in view of the fact that we have just completed one trial which had such prominence and such startling, let's say, colorful newspaper reporting, the situation right now would be worse than it has ever been, so that is the reason I ask for a substantial delay, but in any event, and I might say in the alternative I would request a continuance until I think January 6, at which time we will have some new jurors in any event. I understand we will have a new call which will mean that we will have at least, I think, one-half of the jurors, it is my understanding, who will not have had service before and who will not have attended the voir dire interrogation of the Jr. trial.

I might point out that those jurors who did attend the voir dire examinations in the case against defendant, Dave Beck, Jr., so far as any instructions given them is concerned, have been permitted to circulate with the rest of the jurors at all times during the trial, and after they were present in the course of the voir dire examinations, and while we can't draw any presumptions about it—well, I think we can—I think we could almost presume that undoubtedly those jurors have conferred with other jurors concerning what they learned or what they heard or the nature of the case or the nature of the questions that were asked in the course of the voir dire examination, so as an alternative I ask for a continuance at least until January 6.

The Court: How long is it anticipated that the hearing in [fol. 2268] the Washington, D. C. matter which is scheduled for December 2 will last?

Mr. Burdell: I asked Mr. Williams that, and he said a continuance of two weeks would be sure to take care of it.

The Court: Have you concluded?

Mr. Burdell: I was just about to say that as a third alternative in view of this unfortunate situation in Washington over which we really have no control, I would request and do request a continuance of two weeks so that

Mr. Beck might attend that trial after which he will promptly return here and promptly be prepared to go on trial if the court decides that that is the reason for which a continuance should be granted. I might say in my conversation with Mr. Williams, when he said he thought two weeks would do it, I asked him what assurance he could give me of that, knowing of course that sometimes cases take longer than originally planned, and he said in any event he would arrange to have Mr. Beck's testimony given at such time that even if the trial were not over he could be excused and be back in Seattle at the end of the two-week period.

Now I have concluded.

The Court: Addressing myself to the first paragraphs of your motion, I am not at all impressed with your contention that Dave Beck, Sr., cannot have a fair trial in this community at this time. I believe arguments such as these do poor credit to the intelligence and fairness of the high-calibered jurors that we have in this community, and I am satisfied from observing the trial of cases for [fol. 2269] many years here and observing the type and quality of jurors that we have had, particularly in recent years and recent months, that it is possible to find 12 jurors who can give a defendant, including this defendant, just as fair a trial in December as one could be found to give him in May. I, therefore, will deny your motion for a long continuance.

I will hear from Mr. Smith on those contentions raised in paragraph six and the subsequent paragraphs of the motion.

STATEMENT BY MR. SMITH

Mr. Smith: Thank you. May it please the court, at the outset we would like to say that notwithstanding the fact that we did not object to Mr. Burdell's testifying under oath in lieu of an affidavit, for the record, the State would like to deny each and every statement and opinion Mr. Burdell might happen to have made for this reason:

Notwithstanding the fact that I would personally vouch for Mr. Burdell's veracity outside the court, we have no opportunity to go through item by item any statement

made by him in his testimony in lieu of an affidavit, and, therefore, we do not wish the record to appear that his affidavit or testimony is uncontroverted.

With particular reference to the request by the defendant that he be given a continuance, a further continuance in this case, the State's position is still the same now as it was on October 7, 1957, when the first motion was made in this court, and as it was in November when the second motion for a continuance was made in this court, that to grant the defendant a continuance in this case will not serve the best interests of justice and is to serve [fol. 2270] only the purpose of delaying the orderly administration of justice in the courts of this State.

It is very definitely the opinion of the State that these motions for continuance are nothing more than an effort on the part of the defendant to delay ad infinitum the trial of this case. As we indicated to the court on October 7, 1957 there will naturally arise, if any continuance is given in this case, a conflict of jurisdiction between the State court and the federal courts. By statements made by counsel and by information which is on file in this case there is no reason to believe that there will not be a great number of cases arising in the civil courts of the states and in the civil and criminal courts of the federal courts against the defendant or other persons connected with his organization. For that reason, if for no other reason, the State does not feel that the fact that the defendant is named as one of the 14 or more or less defendants in a civil case in the federal court on December 2, we do not feel that that is sufficient to grant another continuance in this case, which continuance was granted originally at the request of the defendant and against the wishes of the State.

The defendant, as the court may recall, was given a continuance of approximately three weeks which accounts for the fact that the case is now set for trial on December 2, 1957. Defendant now comes into court and says, "I cannot be here on December 2, 1957, a date we asked for and received, because another case has been set for December 2," and we anticipate that this will happen every month that a continuance might be granted, so for that reason [fol. 2271] we do not feel that this is sufficient ground for asking for a continuance in this case.

As far as the availability of the defendant is concerned for the preparation of this case, we feel that the court should take into consideration the fact that the indictment in this case was returned on July 12, 1957, which has been approximately five months and is nearing six months. The defendant at that time expected that his case would have gone to trial before December 2, and the court granted him an approximately three-week continuance to prepare his case, and it would seem to the State that if the defendant intended to prepare his case, he would have done it in the interim between July 12, 1957 and the present time, November 26, 1957, and that the fact that it is necessary for the defendant to be in Washington, D. C. or in New York, New York, or in Denver, Colorado is completely immaterial on the question of when he should go to trial in Seattle, Washington.

The defendant has countless times in public statements in court indicated that he is a very busy man, that he is an important public figure, and there is no showing that the defendant will be any less busy three weeks, three months, three years from now than he is now, and for that reason the State would like to resist any effort by the defendant on this motion to get a continuance in this case.

Mr. Burdell: Might I say one thing, your honor, I just want to observe that I have considerable difficulty understanding how a continuance of two weeks, which is probably the third alternative I asked for, would in any way [fol. 2272] seriously interfere with the orderly administration of justice in this court. While it is true that the indictment was returned in July, I don't think counsel will say that he and I both have been wasting any time on the case during that period of time. We have filed a number of motions, some of which were put off to meet the convenience of the court, but were, I think with that exception the motions were prepared, filed and argued expeditiously. They were motions which counsel might say were frivolous, but they were motions which in all cases were believed by me in good faith to be motions which were necessary to be made on behalf of the defendant. There has been no wasting of time concerning that period. We have a very, very interesting and strong record on that point. The record shows

the motions, the arguments, the time which the other courts gave us within which to file the motions, and then I believe the only continuance which was granted to us in this case at any time was the continuance granted—as a matter of fact we were denied a continuance at the time of arraignment. We were denied continuances several times on preliminary matters. I believe the only continuance we got for anything was the continuance which this court gave us of, I believe, a few weeks—what was it—six weeks?

Mr. Smith: Three weeks.

Mr. Burdell: Three weeks. I believe at that time it was almost a continuance to meet my—I believe what the court had in mind was that it was a continuance to grant my own personal convenience because of the fact that I had become considerably involved in these two cases. [fol. 2273] I see no conflict at this point between the federal court jurisdiction and the State court jurisdiction which will exist two weeks after December 2. There is the conflict at this point which is not of my doing, but as I stated I am assured that there will be no conflict two weeks after December 2, and I can give the court assurances that from my point of view there will be no conflict at that time. Of course, at the time I will have no choice about it, anyway. If the case is set for trial at that time, that's undoubtedly when the case will go to trial, no matter what the conflict is.

The Court: Mr. Pilgrim, we are not set up for jury cases on the week of December 16?

Mr. Pilgrim: Non-jury week, December 16.

The Court: There is not another jury week until January 6.

Mr. Burdell: January 6 is the date that seemed to me would—while it wouldn't meet the problem which I feel exists and which, while I know the court remarked that gives little credit to our jury system, I hope that that isn't something that is reported in the newspapers so that the prospective jurors have some prejudice towards me at the time of trial, but in any event I hope the court knows that I make these contentions in good faith and that I believe this to be the situation, so that in any event it would

seem to me that the date of January 6, while it wouldn't meet that problem which I believe to exist, it does solve the problem about the fact that many of the jurors will undoubtedly be the same jurors who have been here and will have discussed the situation or will even consist of people who were present during the interrogation of the [fol. 2274] jurors in the Dave Beck, Jr., trial, and then, of course, that would also solve the problem which exists in Washington, D. C.

The Court: Well, isn't there some substance to Mr. Smith's surmise or prediction that it is very likely that Mr. Beck will have business in some court somewhere almost any time we would set, and I say that merely because that having been head and still being head of a far-flung empire like the Teamster's Union it seems to me that there's at least a civil matter involving them in many states and many parts of the country a good share of the time.

Mr. Burdell: As a matter of fact, that is true, your honor, but we are not asking the court to take those ordinary things into consideration. It just happens that I have to appear for Mr. Beck in Judge Hodson's court tomorrow on a motion to show cause, which will probably take me a good part of the day, and which will probably consume time which I should be spending preparing for this case. It is not a matter that invclves the State at all, but I haven't, up until your honor's question I haven't even suggested that as any reason for a continuance of this case, and, there are many other cases of that sort which we are not suggesting should be considered at all. If we wanted to bring in every case that involved Dave Beck, we could bring many, many, but for the reason the court suggested we are not doing that. We don't think that's material. We don't think that gives us any right to a continuance, but the only cases that Mr. Beck feels or that I feel on behalf of Mr. Beck should be considered in this mat- [fol. 2275] ter are No. 1, his income tax case—well, I'll put it this way:

We feel that there are three important cases which should be considered, and so far as I know, everyone has attempted, including the federal courts, to avoid any real conflict. Now, Judge Boldt, after consulting with me con-

cerning the dates of these two cases in this court, set April 14 as the date for the trial of Mr. Beck, Sr., in the income tax case. He set it back some substantial period of time for a number of reasons, but included among others was the reason that these cases were set for, or he thought these cases might be tried in November through January. That's the one case which is important, and there can be no conflict there.

The only other case that is important besides this case which we are now discussing is the case which is in Washington which is a case of very substantial importance and is not the ordinary type of case which we would ordinarily let interfere with the orderly procedures of this court. Most of the cases we wouldn't even mention to this court as being anything that should be considered, but since that case does involve an attack upon, well, actually it involves the welfare of the entire union, and as I understand it, there's some question of whether or not a trustee should be appointed for the union. I understand there is some difficulty or some problem about conducting the affairs of the union under these particular circumstances. Now, this is a matter, of course, which involves many, many people, and many, many union members who are not to be blamed, of course, or in any way affected by the difficulties that [fol. 2276] Messrs. Beck and Hoffa are having at this time. That case, we feel, is of considerable importance to the point of view of Mr. Beck, because he feels that he is right about it, but also it is important to the union, itself, and I am sure that Mr. Smith, who is representing the plaintiffs, expects to use Mr. Beck and has expected to use Mr. Beck as a witness.

Now, it is only those three cases that I have any concern about, and which I would urge on the court as being cases which should be considered in arriving at a determination of this matter.

The Court: Well, on the face of it I think the importance of the hearing in Washington may be conceded. On the other hand, it is a civil case and this is a criminal case. Generally speaking I think a conflict between a civil case and a criminal case should be resolved by requiring the civil case to yield the right of way to the criminal case.

Point No. 2, the date of trial of the criminal case here in Seattle was set, as I understand it, before the date of this hearing in the equity case in Washington.

Point No. 3, the date of December 2, which was set by me on a motion in the granting of a continuance was a date suggested by you, yourself, Mr. Burdell, as an agreeable date for the trial at that time.

Mr. Burdell: Well, agreeable, except for the fact that I wanted a longer period of time.

The Court: Oh, yes. After I had denied your motion for a long continuance until about May on this ground of hostility or hostile feeling, I then said that for your accommodation in the preparation of the case, I thought [fol. 2277] there was some merit to it and would give you the continuance, and after some colloquy I believe you stated in open court that that would be agreeable.

Mr. Burdell: I am quite sure I did.

DENIAL OF MOTION

The Court: So for those three reasons I'll deny your motion.

[fol. 2278] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR KING COUNTY

No. 30967

STATE OF WASHINGTON,

Plaintiff,

vs.

DAVID D. BECK, a/k/a DAVE BECK,

Defendant.

EXHIBITS FILED IN SUPPORT OF MOTION FOR CONTINUANCE—
Filed November 26, 1957

[fol. 2341] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY
No. 30967

STATE OF WASHINGTON, Plaintiff,
vs.
DAVID D. BECK, a/k/a DAVE BECK, Defendant.

CHALLENGE TO THE PANEL—Filed December 2, 1957

Comes Now the defendant, David D. Beck, also known as Dave Beck, through his attorney Charles S. Burdell, pursuant to the provisions of RCW 10.49.030 and RCW 10.49.040; and challenges the entire panel, and each member thereof, of the jurors which have been selected and drawn and are available for impanelment as petit jurors in the above-entitled case, for the following grounds and reasons:

1. Written instructions, intrinsic to the evidence and instructions which will be submitted to the petit jurors herein, have been circulated to or among all or some of the members of said panel;

2. Hostile and adverse publicity concerning the defendant herein, contributed to and engendered in part by the Prosecuting Attorney and the Grand Jury which returned the Indictment herein, has been circulated throughout the jurisdiction of this Court to such a degree that it must, as a matter of law, be considered to have affected the partiality of the members of the aforesaid panel, and which has created throughout the jurisdiction of this Court, an atmosphere so prejudicial to the defendant that it is and will be impossible to impanel and select unbiased and impartial jurors, or jurors who can disregard or lay aside prejudice and consider the facts and evidence herein in an [fol. 2342] impartial manner, and that a trial under such circumstances and before such jurors would constitute a violation of the substantial rights of the defendant as guar-

anteed by the Constitution of the State of Washington and Constitution of the United States;

3. Members of the panel were present in the course of interrogation of the prospective jurors in the case of *State of Washington* v. *Dave Beck, Jr.*, Cause No. 30966, during the course of which interrogations comments and statements prejudicial to the defendant herein were made, and during the course of which subjects were covered consisting of and including matters prejudicial to the defendant herein;

4. During the trial and after the trial of the aforesaid case of *State of Washington* v. *Dave Beck, Jr.* newspaper, television and broadcast reports were circulated throughout the jurisdiction of this Court, and said reports included comments and statements adverse to and prejudicial to the defendant herein, and such reports were circulated to such an extent and degree that they were heard and seen by members of the panel herein;

5. Certain members of the panel were selected as prospective jurors in the aforesaid case of *State of Washington* v. *Dave Beck, Jr.*, and were challenged peremptorily by the defendant, who is the son of the defendant in the above entitled case;

6. The prospective jurors who attended the aforesaid interrogations in the case of *State of Washington* vs. *Dave Beck, Jr.*, and jurors who have read and heard the newspaper, radio and television reports, as aforesaid, have communicated freely among themselves in the course of their jury service for the past several weeks prior to the trial date of the above entitled case.

Charles S. Burdell, Attorney for Defendant.

[fol. 2343]
State of Washington,
County of King, ss.

Charles S. Burdell, being first duly sworn on oath, deposes and says:

That he is the attorney for the defendant herein and that he makes this affidavit in support of the defendant's challenge to the entire panel as follows:

That affiant is advised and believes, and therefore avers, that a set of written instructions has been delivered to all or any members of the jury panel; that members of the panel have read said instructions and have discussed said instructions among and between themselves; that affiant has personally observed members of the panel reading and discussing said instructions;

That said instructions included erroneous and improper statements which are prejudicial to the defendant herein and will impair his right to a fair and impartial jury;

That affiant was present at the interrogation of the prospective jurors in the case of *State of Washington* vs. *Dave Beck, Jr.* and conducted said interrogation on behalf of defendant; that there were forty jurors selected as prospective jurors in said case; that the thirteen who were finally selected as jurors, and alternate jurors, were permanently excused at the conclusion of the trial in the *State of Washington* vs. *Dave Beck, Jr.;* that the remaining jurors were present in the course of the interrogations, and have not been excused and are presently included on the panel; that in the course of said interrogations it was revealed that the defendant herein had been the subject of charges of improper and unlawful conduct by a United States Senate [fol. 2344] Committee and by others; and that it was also revealed that the defendant herein had been the subject of many hostile and prejudicial remarks and discussions throughout the jurisdiction of this court. That affiant, on behalf of the defendant, Dave Beck, Jr., who is the son of defendant herein, exercised seven peremptory challenges in the course of selection of the jury, and that the jurors so challenged remained on the panel for the trial of the case herein;

That during the course of the trial of *State of Washington* v. *Dave Beck, Jr.* there were constant newspaper, television and radio reports concerning the course of the trial, many of which were hostile and prejudicial to the defendant and indicated that the defendant had committed a wrongful and unlawful act or acts; that some, but not all, of the aforesaid newspaper reports are included in the file herein; that said reports were circulated prominently and to an extensive degree throughout the jurisdiction of this

court, and included large type headlines in the newspapers and many have come to the attention of the members of the panel herein;

That present members of the panel, including those present at the aforesaid interrogations and those who were the subject of peremptory challenge, were permitted to confer among themselves freely during the trial of the aforesaid case of *State of Washington* vs. *Dave Beck, Jr.;* that said case was the most prominent and publicized case which has been tried during the entire term of the present jury panel, and one of the most, if not the most, publicized case which has been tried within the jurisdiction of this court for many years.

[fol. 2345] Affiant also incorporates herein the records, affidavits and exhibits heretofore filed relating to and demonstrating the conduct of the Prosecuting Attorney, of the Grand Jury, proceedings relative to the impanelment of the Grand Jury; and affiant also incorporates herein by reference affidavits and exhibits relative to publicity circulated throughout the jurisdiction of this Court relative to and concerning the defendant.

Charles S. Burdell.

Subscribed and sworn to before me this 2 day of December, 1957.

Virginia H. Berk, Notary Public in and for the State of Washington, residing at Seattle.

[fol. 2347] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR KING COUNTY

No. 30967

STATE OF WASHINGTON, Plaintiff,

vs.

DAVID D. BECK, also known as DAVL. BECK, Defendant.

EXHIBITS—Filed December 2, 1957

[fol. 2394]

Supplemental Statement of Facts

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

No. 30967

STATE OF WASHINGTON, Plaintiff,

vs.

DAVID D. BECK, a/k/a DAVE BECK, Defendant.

PROCEEDINGS ON MOTION FOR ORDERS ALLOWING DEFENDANT TO PUBLISH AND INSPECT TRANSCRIPT OF GRAND JURY VOIR DIRE AND ALLOWING DEFENDANT TO PUBLISH AND INSPECT TRANSCRIPT OF SAID GRAND JURY PROCEEDINGS—August 12, 1957

APPEARANCES:

State of Washington—Charles O. Carroll, Prosecuting Attorney, King County; Laurence D. Regal, Deputy Prosecuting Attorney, King County.

Dave D. Beck—Charles S. Burdell, William Wesselhoeft.

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[fol. 2398] COLLOQUY RE WHETHER OR NOT THIS COURT IS THE CORRECT COURT TO HEAR THESE MOTIONS

The Court: The point is I am not going to have any problems of that sort made if a day one way or another is not going to stop the wheels of justice here. If this matter should be properly before Judge Shorett and you feel so, I think that could be worked out.

Mr. Burdell: It seems to me from what I have read that, as I say, the court which had the grand jury in charge is the best court to decide any question which might relate, and

this is the foundation problem on that point, but the court which had the grand jury in charge is the best court to decide. He is the court who has observed the grand jury and its proceedings and its conduct. He is the one who instructed the grand jury. He is the one who presumably was present from time to time to observe the manner in which the grand jury was being conducted, who was present, what instructions he gave to the prosecutors or the grand jury concerning presence of persons before the grand jury. That court might know something about these questions as a matter of [fol. 2399] personal knowledge, which this court does not know.

It is quite similar to a situation where at the conclusion of a trial a petit juror is claimed to have engaged in some sort of misconduct. Of course, the trial judge is the best judge to know to what degree he observed the jury, to what degree he watched their conduct, how his bailiff conducted himself or herself, and so forth, things of that sort.

I gather from the one or two cases that I read that that's the theory under which these cases have indicated, that the court which had the grand jury in charge is the best court to decide these things.

However, I just wanted to make this clear that if this court should decide this question adversely to either of the defendants in this case, then no ground or no claim will be made that there is any error in the fact that this court decided it instead of Judge Shorett. I bring this point up simply because I thought this court, or, possibly, the presiding court if these things were brought to the court's attention might decide that Judge Shorett is the best court to hear them and might decide that Judge Shorett would prefer to hear them, were he consulted. But I am not raising that as any motion or anything of that sort. I hope I have made myself clear.

The Court: Surely. In view of your remarks, I think I would like to hear from Mr. Regal as to his views on this.

If it should properly go before Judge Shorett, I would like to know it now rather than take up your time.

Mr. Regal: Your Honor, I think counsel's remarks about the judge having personal information regarding certain

of the allegations in his memorandum, and so on, are ac-
[fol. 2400] curate.

I do feel that our supreme court in a few recent cases has looked to the justice of a cause rather than to technical rules. I don't think counsel for the defendants can waive certain protections of the law. It is very possible that even though counsel says to us now that he is not going to raise this point, it still will be an arguable point that will be in this record that will go before the supreme court if it goes that far, and it might be persuasive.

Mr. Burdell: Perhaps, some other counsel will be representing the defendant.

Mr. Regal: Or some other counsel.

The Court: That is right.

Mr. Regal: Counsel says, in his memorandum, and I know because of press of business had to have other counsel prepare his memorandum, there are no cases in point. That is not true.

There is a case of State v. Engles, where this question of whether or not a court can grant a transcript of the proceedings is discussed. You may look at it. I think the discretion should be exercised due to the comment of Mr. Burdell and not before that.

I was perfectly willing to have had this matter heard by your Honor. I think maybe Judge Shorett should hear the matter. Time is not important in this.

The Court: Yes.

Mr. Regal: The motion is properly made.

One thing I want to clear, I may be in error, Dave Beck was arraigned and entered his plea all at the same time. I don't know. That was my information. I was in Tacoma [fol. 2401] at the time.

Mr. Burdell: Pleas are entered in both.

The Court: I thought I noticed in this one there was a motion to extend the time, motion for postponement of arraignment.

Mr. Regal: That was denied.

The Court: Oh, that was denied.

Mr. Regal: There was a special arraignment for the convenience of Mr. Dave Beck, Senior. He was arraigned

and did enter his plea on the same date. That was on a Friday.

The following Tuesday Dave Beck, Jr. was arraigned. It is my understanding, without knowing, that he entered his plea, too. Mr. Burdell would know about that.

Mr. Burdell: I understood he did, too.

Mr. Regal: He did. I thought you mentioned that you wanted to argue this today because "prior to pleading." Isn't that what he said?

The Court: Prior to pleading. He has been arraigned and has pleaded, hasn't he?

Mr. Regal: Yes.

Mr. Burdell: But, as I understand it and I wasn't here, but I think Mr. Regal was here at one of the arraignments and pleas, as I understand it each defendant has been given thirty days from the time of arraignment and plea to file motions against the indictment, including motions to set aside the indictment.

Mr. Regal: That's right.

Mr. Burdell: With respect to alleged irregularities of the grand jury, and the point that I raised on that was [fol. 2402] simply this, that I don't know just exactly when Judge Shorett is going to be back. Of course, if we are granted the right to inspect all or any part of the transcript, I presume it will take some time to prepare it. Whether or not we could even get the transcript by August 24, I don't know.

Mr. Regal: I think it was Judge Todd that denied the motion for putting off the arraignment and continuing it. He indicated that if there is some reason for the thirty-day period,—no, it wasn't Judge Todd either. It was Judge Roney,—he was sure that the court would grant it. So, I am positive that the court will grant it.

I will so stipulate now if counsel brings this matter on before Judge Shorett at the earliest possible date that he can and uses due diligence, we certainly will not resist an adequate continuance for him to get this transcript typed up, assuming he gets it from the court, and preparing motions against our indictment.

Mr. Burdell: That's quite satisfactory.

The Court: Very well, then the stipulation in open court is so noted.

Well, then, gentlemen, that is about it. It is kind of an interesting legal problem here, but it sounds to me like it is the appropriate thing to do, particularly if there is the least doubt in the minds of either one of you of the way to handle it.

Mr. Regal: As far as the technical proposition is concerned, I think Mr. Burdell's statement that he would not raise the question again may be binding on Mr. Burdell's honor but not on subsequent counsel who may take the case [fol. 2403] to the supreme court.

The Court: No, and I do not want Mr. Burdell placed in that situation.

Mr. Regal: No, there is no hurry. I don't think there is that much rush on that thing.

Mr. Burdell: It seemed to me counsel's statement was quite clear, and I don't think I have any misunderstanding of it, and I doubt if there can be. But, as I understand it, we will arrange mutually and with the court's permission, that is, Judge Shorett's permission, to bring this matter on for hearing before him as soon as he will hear it after he gets back?

Mr. Regal: Correct.

Mr. Burdell: Thereafter, if he permits us to examine all or any part of the transcript, we will mutually agree that we shall have a reasonable time after we have received the transcript to file our motions including any motion we may have to set aside the indictment on the grounds mentioned in this, the statute.

The Court: I wonder if we should not continue it to a date certain and with you, of course, having the opportunity to discuss with Judge Shorett a date?

Mr. Regal: Well, do we know when Judge Shorett will be back?

The Court: Well, he will be back right after Labor Day, and I wonder if the thirteenth, which is the first Friday after he will be back—I believe I am not clear just when his month is up.

Mr. Regal: He will sure to be back at that time.

[fol. 2404] Mr. Burdell: Yes.

Mr. Regal: One-thirty?

The Court: I would say so. I believe I can make that order directly from here. I will advise Judge Turner that I have taken this step on my own, and that will send it directly to Judge Shorett's court. You can handle that, Mrs. Clerk?

The Clerk: Yes.

Mr. Regal: The possible point of disagreement as far as I can see, the only thing that might change things is when Judge Roney was presented with this matter, he said that it should be thirty days from the time the order is entered. And the oral order is entered, thus compelling counsel for the defendants to get the reporter to work on it. Then if there is some special reason why the reporter can't, they can make application for extended time. But if they are going to wait until some reporter casually gets around to it,—I know Mrs. Sartor who is the reporter in this case is not going to do this, but I want an understanding thirty days from the time the court grants orally to have the order typed up with no argument if there is a reasonable cause for delay.

Mr. Burdell: I would have no objection to that.

The Court: Very well, that will be your agreement as stated.

Mr. Regal: Thank you, your Honor.

(Court was adjourned.)

[fol. 2405]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR KING COUNTY

No. 30967

STATE OF WASHINGTON, Plaintiff,

—vs.—

DAVID D. BECK, Defendant.

Proceedings of July 26, 1957

Be It Remembered that the above entitled cause came regularly on for the purpose of arraignment, on Friday, July 26, 1957, at the hour of 3:10 o'clock p.m., before the Honorable Ward Roney, sitting as Presiding Judge of the above entitled court;

Laurence D. Regal, Esq., Deputy Prosecuting Attorney, appearing for Plaintiff;

William Wesselhoeft, Esq., appearing for Defendant.

Whereupon the following proceedings were had, to-wit:

The Court: State of Washington vs. David D. Beck.

Mr. Wesselhoeft: Ready, your Honor.

Mr. Regal: Your Honor, we are here today for the arraignment. This is not the usual arraignment time, and for the record I would like to explain why we are here at this time. The regular arraignment calendar is at 11:00 o'clock on Friday and 11:00 o'clock on Tuesday. Mr. Beck's attorney, Mr. Wesselhoeft, was notified that the arraignment of the defendant would be next Tuesday at 11:00 o'clock. This afternoon he served a motion for postponement of arraignment on me. This motion was heard by [fol. 2406] your Honor, and the motion was denied. And it was denied, I think, on the basis that we would come in here this afternoon for a special arraignment. I agreed to come in here for a special arraignment because Mr.

Beck is due to go out of town on business and cannot be here next Tuesday.

The Court: That is what the Court understands.

Mr. Regal: Very well. May the record show now that I am serving a certified copy of the indictment on Mr. Beck and his attorney, Mr. Wesselhoeft.

The Court: The record may so show.

Mr. Wesselhoeft: We are reserving the right, your Honor, to move against the indictment; and if the Court would permit at this time I should like to read into the record as follows.

The Court: Very well.

Mr. Regal: Before we do that, can we finish the arraignment? Mr. Wesselhoeft, do you wish the indictment read, or do you waive the reading of the indictment?

Mr. Wesselhoeft: We will waive the reading of the indictment, provided that in no way do we waive our right to move against it.

The Court: It is so understood. There are no waivers on the part of the defense, but waiver of reading of the indictment is noted for the record.

Mr. Wesselhoeft: Very well. Prior to the plea, your Honor, the defendant moves that the defendant be extended permission to have thirty days in which to move against the indictment or to move against the grand jury proceedings in any particulars, or to make any other motion and/or demurrer which the defendant could and/or should make at [fol. 2407] the time of arraignment, and the same shall be deemed to be made at the time, provided that the defendant shall upon proper showing of a court order have the right to have the thirty day period extended from time to time as circumstances dictate and in particular to allow defendant's attorney to obtain and study such portions of the grand jury proceedings as the Court shall order produced to the defendant.

Mr. Regal: Now, your Honor, I would like to complete the arraignment proper. I feel we should ask the defendant, David D. Beck, whether or not that is his true name, and I will proceed to do so if I may.

The Court: Well, pardon me, Mr. Regal. I don't know from Mr. Wesselhoeft's statement—are you insisting upon

a ruling on the motion at this time prior to the arraignment, or as a condition of the arraignment?

Mr. Wesselhoeft: As a condition of the arraignment, your Honor.

The Court: Very well. The Court understands. You may proceed.

Mr. Regal: Mr. Beck, is that your true name, David D. Beck?

The Defendant: Yes, it is.

Mr. Regal: The record already indicates that I have served a certified copy of the indictment on Mr. Beck and his attorney.

The Court: That is correct.

Mr. Regal: I understand also at this time, your Honor, that Mr. Beck wishes to enter his plea in this matter, so he will be free then to leave the jurisdiction temporarily for business reasons.

[fol. 2408] The Court: Yes. Mr. Beck, you are present here, of course, with your attorney. You have been provided with a copy of the indictment, the reading of which has been waived. Are you prepared at this time to enter your plea?

The Defendant: I am, your Honor.

The Court: What is your plea to the charge?

The Defendant: Not guilty.

The Court: Plea of not guilty will be entered of record. Upon the motion of the defense for a continuance, the record does show that Mr. Beck is committed to appear somewhere—in Florida?

Mr. Regal: In Florida, I think it is.

The Court: —out of the State. The matter of this arraignment has been advanced from the time it was originally set to come up next Tuesday, July 30. The defense is now requesting allowance of time within which to move against the indictment or any proceedings leading up thereto. This is not an uncommon motion or request. Since the arraignment has been advanced upon the calendar some three or four days, it appearing to the satisfaction of the Court that Mr. Beck does have commitments elsewhere, and it further appearing that the Court is in reality about to recess for the vacation period of time, nothing would be

accomplished within the next thirty days anyway. And I don't understand, Mr. Regal, that the Prosecuting Attorney is seriously resisting the matter.

Mr. Regal: Well, we want it clearly understood that this continuance, as it is called, or this period of time that is being granted the defendant to move against the indictment will not necessarily stop us from setting the case for [fol. 2409] trial because issue is joined at the time of the plea and the cause can be set for trial on the regular setting schedule.

The Court: The motion did not so indicate. The motion was simply that the defendant be granted a thirty day period or extension of time within which to move against or otherwise object to the proceedings.

Mr. Regal: It is a standard request, but I just want to be sure that defense counsel knows that this does not mean that we can't go ahead and set this case for trial.

The Court: No, this is not an abatement or a stay in any sense of the word.

Mr. Regal: Fine.

The Court: Mr. Wesselhoeft, in all fairness so we all understand each other, your motion seemed to indicate that it should be understood as well that the matter may thereafter be extended from time to time. I am in no position to bind any other Judge as to any further extension, but I have no hesitancy in granting the thirty day period requested at this time.

Mr. Wesselhoeft: Well, your Honor, I can say this for the record, that is, that I have checked with the court reporter who handled the grand jury proceedings and she advises that because of other prior commitments it will be impossible for her to commence transcribing any portion of those proceedings until the 10th of August. Today is the 26th of July. Those grand jury proceedings, if transcribed, would take twenty days of her time, and the voir dire proceedings would take four or five days of her time. A thirty day extension would, therefore, be insufficient; [fol. 2410] and I want it clearly understood that in the event that the Court should permit the issuance to me of any or all such transcripts as I shall seek, I will come back into court and strongly urge additional necessary extra

time to obtain those transcripts, which should in no way operate to prejudice our proper preparation of this case.

The Court: Well, on a proper showing I can't conceive of any Judge denying that request, but again I think my authority at this time is simply to grant the thirty day extension and without prejudice to your reapplying for further extension as you deem the conditions warrant.

Mr. Wesselhoeft: It is so understood, your Honor.

Mr. Regal: Thank you.

The Court: Thank you very much, gentlemen.

(Conclusion.)

[fol. 2411] In Cause Nos. 30966 and 30967, the following proceedings were had at 2:25 p. m., November 7, 1957, in the Department of the Presiding Judge before the Hon. Malcolm Douglas, Presiding Judge; Mr. Charles Z. Smith, deputy prosecuting attorney, representing the State of Washington and Mr. Charles S. Burdell representing the defendants Beck:

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[fol. 2427] DENIAL OF MOTIONS

The Court: On the showing as to the state of public opinion being such that the defendants cannot get a fair trial, I am not impressed with the additional showing as adding anything of substantial weight to the showing that was made before me on October 7 and which, for the reasons that I then explained, I found insufficient to justify me in granting a continuance until May of 1958.

Your motion for a continuance of one month now is untenable on the same grounds, in my opinion, that your motions heard on October 7 were untenable. I find it difficult to believe realistically that there would be any difference in your ability to secure fair-minded jurors on the 12th of December than on the 12th of November.

An additional reason, which is practical and has to do with the mechanics of our calendars, is that we would be pushing the Christmas holiday season pretty closely. Our last jury regularly impaneled is for that week of December [fol. 2428] 9; there are no more juries for the rest of De-

cember. That would mean we would be holding jurors probably well on beyond their term on the Dave Beck, Jr. case if a month's continuance were to be granted.

I think it is fair to surmise that the selection of a jury might take a number of days, and I do not know what the estimate of counsel is as to the time that the trial would probably consume. I would be inclined to speculate it would be a matter of 10 days probably or two weeks, that you might do well to complete it in that time. Therefore, if you pushed the Dave Beck, Jr. case over to the middle of December, and the Dave Beck, Sr. case, which is now set for two weeks after, it would have to go into January; and I see nothing in the showing made that would justify the consequent disruption in the setup of the cases for trial that has already been made.

As to this alternative ten-day continuance, much of what I said applies to that too. Certainly the part with respect to calendars and finding a proper time which is fair to both sides does.

As to legal rights and the decision as to whether the regular and orderly process of bringing the defendant to trial should be interrupted by cancelling the present setting for trial in the Dave Beck, Jr. case, Cause No. 30966, I feel the showing is not strong enough. If Judge Shorett's rulings were not sound, if they do violence to any rights of the defendants, I am sure that there is a time and place where those rights can be asserted and heard without halting the processes of bringing a defendant to trial at this stage of the proceedings.

[fol. 2429] I will deny the motions.

* * * * * * *

[fol. 2430]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

No. 30967

STATE OF WASHINGTON, Plaintiff,

—vs.—

DAVE BECK, SR., Defendant.

No. 30966

STATE OF WASHINGTON, Plaintiff,

—vs.—

DAVE BECK, JR., Defendant.

Transcript of Proceedings—November 4, 1957

Be It Remembered, that on the 4th day of November, 1957, at the hour of 1:30 o'clock p.m., the above-entitled cause came on regularly before the Honorable Lloyd Shorett, one of the Judges of the Superior Court of the State of Washington, for King County, sitting in Department Number 8.

APPEARANCES

The Plaintiff, State of Washington, was represented by Charles O. Carroll, Prosecuting Attorney, County-City Building, Seattle 4, Washington, through Charles Z. Smith, Deputy Prosecuting Attorney.

The Defendants, Dave Beck, Sr., and Dave Beck, Jr., were represented by the law firm of Ferguson & Burdell, Attorneys at Law, 1012 Northern Life Tower, Seattle, Washington, through Charles S. Burdell, and John Keough, [fol. 2431] Attorneys at Law, 725 Central Building, Seattle, Washington.

Whereupon, the following proceedings were had and done, to-wit:

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[fol. 2478] COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Well, I just merely mention that because we might, I think, reminisce just a little. I think two grand juries ago there was an indictment returned against the employee of the county commissioners, I think John C. Stevens, and some employee of his was indicted and the information was attacked in court. I believe Judge Agnew was then a deputy prosecutor, or in charge of that, and I think he dismissed the indictment and filed an information wherein all the arguments which had been amassed against the indictment was thrown out the window and went ahead on the information.

Mr. Burdell: Well, actually there has been some concern to me in this case, frankly, in view of the record, and frankly in view of some of the arguments I have been making, it has been of some concern to me about what would happen to my record if this indictment were dismissed and an information returned. Of course, going back to the argument, or your Honor's question about the statements, if I were asserting that the same attorney or representative [fol. 2479] who made the argument to the Grand Jury is responsible for determining whether or not an information would be returned, then my argument would be inconsistent, but I don't believe that to be the situation.

The Court: All right.

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[fol. 2526] The Court: Well now, I am inclined to think this, that it might be well to give you the transcript of those two witnesses although as a matter of law I question very seriously whether the showing you made even is sustained, and if sustained by the transcript would be any ground for setting aside the indictment, but just as a matter of precaution and to be sure that you are getting whatever you can possibly be entitled to that way, I would be rather inclined to permit you to have that testimony.

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[fol. 2530] The Court: Grunewald. That is the name. Now my notion on this thing before us now is that someone, a prosecutor or deputy prosecutor, said to a witness, "Why, nobody believes you. Can't you tell that we all know you are lying?"—my notion is that this sort of a statement is one which has occurred before practically every Grand Jury held in this county that I have ever heard about and that it is not only the right but perhaps the duty of the prosecutor to attempt to elicit whatever information is available by being a little harsh with witnesses whom he believes are falsifying. But what the Supreme Court of the United States is apt to say about such a situation, if this case should ever reach that tribunal, might be quite different and I would rather there was available in the record all the information so that if the Court or even our State Supreme Court, if it ever gets there, should wish to review the question they would have it available and I want to do that without giving to the defendant the entire testimony of these witnesses so as to avoid possible impeachment.

[fol. 2531] Now with that explanation, I will grant the defendant's motion, the transcript will be prepared at the defendant's expense, delivered to me, and from that transcript I am going to make such excerpts as I think are relevant to this particular inquiry, and have them furnished to the defendant. If that is not satisfactory to the defendant, my inclination is to deny the motion.

Mr. Burdell: Well, let me put it this way, your Honor. It is a compliance or I would say a granting of my alternative motion which I made yesterday which related only to the testimony of the Verschueren and Stratton matter, in which I asked that if it not be made available to the defendant that the testimony be made available to the Court and made a part of the record. Now if I understand what your Honor is going to do, the transcript will be provided to the Court and it is a compliance or granting of my alternative motion if the entire transcript becomes sealed and a part of the record so that the entire transcript would go up.

The Court: Oh, well, that would be fine. All you want is to have this transcript available after trial?

Mr. Burdell: That is correct.

The Court: Oh, well, all right, I will do that for you, certainly.

Mr. Smith: Do we understand the Court's order will be substantially in terms of what the Court said before without the defendant having access before the time of trial?

The Court: All that would happen is this testimony would be transcribed, kept sealed until after trial, and [fol. 2532] delivered to the defendant's attorney after the trial and he can make such use of it then by making it a part of the record if he so desires.

Mr. Burdell: But then I should point out that my motion was in two alternative forms. I asked that I be given the transcript, it be disclosed to me so I could argue, and then in the alternative if it was not, then it should be just made available to the Court for the Court's examination on this point, and then kept a part of the record. Now what the Court was about to do, it seems to me, was to sort of hit a halfway mark between those two motions which would be more satisfactory to me and I think accomplish our purpose more satisfactorily. The court was going to examine the transcript and just make available to me those portions the Court might think would relate to their arguments about inflammatory conduct. Now I believe—

The Court: All right, we will do it that way and the rest of the transcript will be available to you at the conclusion of the trial.

Mr. Smith: We have one other question, your Honor. What legitimate purpose is being served other than the purpose to be served if the testimony were sealed and made available to the defendant after the trial? We cannot see any legitimate pre-trial purpose to be served by granting him access to any more of the Grand Jury testimony.

Mr. Burdell: With respect to that, my motion only was, I will say off-hand at this point either I don't see any use that I could make of the transcript after the trial except maybe in connection with a motion in arrest of judgment and possibly I could, and protect the record somehow, that [fol. 2533] way, but my motion was that if it not be given to me it be made available for the examination of this Court and the appellate court, not by me.

The Court: Ordinarily I do not like these things where a court gets a transcript and then decides without other people knowing what is in it whether it is relevant or important but since the motion is made that way and to protect legitimate objections of what I conceive to be a proper objection, I will do it here. I think that after the trial I will deliver this transcript to you, if you wish. It may be that it will be of no particular benefit to you but you may have it, if you wish. In the meantime the court stenographer will keep it.

Mr. Burdell: Very well but I will be given these portions that the Court selects?

The Court: Yes. And I understand you are willing to pay for the entire transcript?

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[fol. 2560]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 34636

EN BANC

THE STATE OF WASHINGTON, Respondent,

v.

DAVID D. BECK, also known as DAVE BECK, Appellant.

PER CURIAM STATEMENT—Filed February 3, 1960

Per Curiam.—One of the judges of this court disqualified himself from participating in the decision of this case. The eight remaining judges, after numerous conferences, are equally divided in their decision for the reasons appearing in the opinions filed.

There being no majority for affirmance or reversal, the judgment of the trial court stands. ~~affirmed~~. F. P. W.
F. L. C.

It is so ordered.

[fol. 2561]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 34636

EN BANC

STATE OF WASHINGTON, Respondent,

v.

DAVID D. BECK, also known as DAVE BECK, Appellant.

OPINION—Filed February 3, 1960

This is an appeal from a judgment and sentence entered upon a verdict of guilty to a charge of grand larceny by embezzlement. Twenty-nine assignments of error raise a multiplicity of issues.

The trial itself, divorced from the prominence of the defendant, presents a very simple factual issue.

The state's evidence showed that the defendant had possession of a 1952 Cadillac automobile, belonging to the Western Conference of Teamsters; that he authorized its sale; that it was sold for nineteen hundred dollars, and the proceeds of the sale were deposited in one of his personal accounts over which he had exclusive control; that the Western Conference of Teamsters never received any part of the nineteen hundred dollars.

To meet this evidence in support of the charge that he did

> " . . . wilfully, unlawfully and feloniously secrete, withhold or appropriate the said $1,900 to his own use with intent to deprive and defraud the owner thereof;"

[fol. 2562] there was testimony that the defendant thought the car was sold while he was out of the city; that when he returned and found that the car had been sold and the purchase price had been deposited in his account, he delivered nineteen hundred dollars to a bookkeeper and told him to apply it to the account of either the Western Conference of Teamsters or the Joint Council of Teamsters,

whichever owned the car. It was patently a defense that could be contrived to meet the exigencies of the case.

The state's case was clear and unchallenged. The basic issue for the determination of the jury was whether or not it believed the explanation presented by the defense. The verdict of guilty was the jury's answer to that issue.

We shall adopt the appellant's ten divisions for the consideration of the twenty-nine assignments of error.

I. Grand Jury Proceedings. This is the longest section of appellant's brief (some 66 pages).

We disagree completely with the appellant as to the function of a grand jury in this state. In the period when an indictment by a grand jury was a prerequisite to a prosecution for a felony, it was said (and the appellant seems to have assumed its present day applicability) that a grand jury was meant to be a shield between the defendant and the zeal of the prosecutor. For the most part, the cases upon which the appellant relies come either from the time when a grand jury indictment was necessary, or from jurisdictions where it is still a requisite.

[fol. 2563] The grand jury in this state is not and was not intended to be a shield for the accused. Our state constitution provides that,

> " . . . Offenses heretofore required to be prosecuted by indictment may be prosecuted by information, or by indictment, as shall be prescribed by law." Art. I, § 25, Washington state constitution.

Furthermore,

> " . . . No grand jury shall be drawn or summoned in any county, except the superior judge thereof shall so order." Art. I, § 26, Washington state constitution.

The prosecutor's information has become the standard means of bringing charges in this state, as in all other states which authorize its use. It has long been settled that there is no denial of Federal constitutional rights involved in the substitution of the prosecutor's information for the grand jury's indictment. *Hurtado* v. *People of California* (1884),

110 U. S. 516; *State* v. *Nordstrom* (1893), 7 Wash. 506, 35 Pac. 382; affirmed 164 U. S. 705.

The grand jury is now used not as a shield against the zealous prosecutor, as in times past, but to replace, on occasion, the prosecutor who is not sufficiently zealous (for whatever reason), and, more often, as presently, as a valuable but expensive weapon (hence, used sparingly) to assist a prosecutor in investigating conditions and people insulated from investigation by the usual procedures. It has been said that,

> "The inquisitorial power of the grand jury is the most valuable function which it possesses to-day and, [fol. 2564] far more than any supposed protection which it gives to the accused, justifies its survival as an institution. As an engine of discovery against organized and far-reaching crime, it has no counterpart. . . . " *In re Grand Jury Proceedings,* 4 F. Supp. 283, 284 (E.D. Pa. 1933).

It must be accepted for what it is: an inquisitorial body, an accusing body, and not a trial court. Its functions are investigative and not judicial. It is not concerned that the evidence, then available, establish the commission of crime beyond a reasonable doubt. *State* v. *Lawler* (1936), 221 Wis. 423, 267 N. W. 65. The end result of a grand jury's deliberations is not a judgment and sentence, but merely a charge; consequently, the concepts of procedural due process do not apply to the grand jury, except as they may be necessary to prevent prejudice to an accused or a witness in subsequent proceedings; thus, a grand jury may not deny the constitutional privilege against self incrimination, and it may not impair the constitutional protection against unreasonable searches and seizures.

The grand jury is "the voice of the community accusing its members," (Judge Learned Hand in *In re Kittle,* 180 Fed. 946, 947 (S. D. N. Y. 1910)), and it may properly reflect the sentiment of the community. It

> " . . . breathes the spirit of a community into the enforcement of law. Its effect as an institution for investigation of all, no matter how highly placed, creates the elan of democracy." *United States* v. *Smyth,* 104 F. Supp. 279, 291 (N.D. Cal. S.D. 1952).

The appellant, on the other hand, suggests that the grand jurors were disqualified because they presumably reflected the sentiment of the community from which they came. The [fol. 2565] inference from the appellant's argument is that a person who can secure a large amount of adverse publicity from newspapers, radio, and television, thereby becomes immune from grand jury investigation; the more notoriety he achieves, the more reason he should not be investigated.

Investigative agencies—city, county, state, or Federal—do not wait for the hue and cry to die down before they begin to investigate or to file a charge against an accused. Nor do we see why a grand jury investigation should be handicapped or delayed because of publicity of whatever kind or character. Because a grand jury merely makes the accusation and does not try the accused, the general rule is that, barring statutory provisions to the contrary, bias or prejudice on the part of one or more of the grand jurors is not a ground for quashing the indictment. In *United States* v. *Knowles*, 147 F. Supp. 19, 21 (D.C. 1957), it was said,

> "The basic theory of the functions of a grand jury, does not require that grand jurors should be impartial and unbiased. In this respect, their position is entirely different from that of petit jurors. The Sixth Amendment to the Constitution of the United States expressly provides that the trial jury in a criminal case must be 'impartial'. No such requirement in respect to grand juries is found in the Fifth Amendment, which contains the guaranty against prosecutions for infamous crimes unless on a presentment or indictment of a grand jury. It is hardly necessary to be reminded that each of these Amendments was adopted at the same time as a part of the group consisting of the first ten Amendments. A grand jury does not pass on the guilt or innocence of the defendant, but merely determines whether he should be brought to trial. It is purely an accusatory body. This view can be demonstrated by the fact that a grand jury may undertake an investigation on its own initiative, or at the behest of one of its members. In such event, the grand juror who instigated the proceeding that may result in an

indictment, obviously can hardly be deemed to be impartial, but he is not disqualified for that reason."

[fol. 2566] In *Coblenz* v. *State* (1933), 164 Md. 558, 166 Atl. 45, 88 A. L. R. 886, 894, 895, it is said:

"... we find no ground for imposing a requirement that they must be unprejudiced as the objection demands. On the contrary, such a requirement would seem inconsistent with their freedom to accuse upon their own knowledge, for persons who come with knowledge sufficient to serve as a basis of indictment are likely to come with the conclusion and prejudice to which that knowledge leads. They must act upon their own convictions, after conferring secretly and without any interference; but they are not required to come without any prejudice. . . . "

And in *United States* v. *Rintelen*, 235 Fed. 787 (S. D. N. Y. 1916), Judge Augustus N. Hand said (p. 789),

"... An intelligent grand juror can hardly be found who has not decided opinions derived from his general knowledge as to any case of public notoriety. He may have even passionate feelings on the subject, which in general affect and actuate him. The question is not what his feelings were, but whether he voted for an indictment honestly and upon competent evidence. That an indictment can be quashed because the grand jurors had personal prejudices, even ill-founded ones, would leave every indictment in an important case, irrespective of the evidence on which it was found, open to attack. . . . "

We reiterate, as the quoted authorities establish, that the general rule is that, barring statutory provisions to the contrary, bias or prejudice on the part of one or more of the grand jurors is not a ground for a quashing of a grand jury indictment, or for setting aside the judgment based on the verdict of a petit jury after a trial on such an indictment. The appellant says our consideration of this case must be based upon the premise that he, as a matter of

law, was entitled to an impartial and unprejudiced grand jury.

If we assume that the premise is correct, we are confronted with the fact that there is no showing that any [fol. 2567] member of the grand jury was biased or prejudiced against the appellant. His contention is that some or all of the members of the grand jury must be biased or prejudiced against him because of the unfavorable publicity which he had received. Jury verdicts will not be set aside on such unsupported suppositions.

However, the premise is not correct unless, as the appellant urges, our 1854 grand jury statute requires that grand jurors be impartial and unprejudiced. The only support for the suggestion that there is such a statutory requirement is contained in one section which relates to the long-gone situation where a grand jury met for the purpose of considering whether persons then in custody or released on bail and "held to answer for an offense" should be indicted or released. Such a person might challenge the panel because it was not drawn properly (RCW 10.28.010), or might challenge individual grand jurors

> " . . . for the reason of want of qualification to sit as such juror; and when, in the opinion of the court, a state of mind exists in the juror, such as would render him unable to act impartially and without prejudice." RCW 10.28.030.

There was a reason for such a challenge by a "person in custody or held to answer for an offense," but the appellant was not such a person. When a modern grand jury starts its investigative process it seems ridiculous to suggest that as each new personality comes under scrutiny the proceedings must stop until it can be determined whether any member of the grand jury is biased or prejudiced against him; and, if a grand juror is so biased or prejudiced, the in- [fol. 2568] vestigation is at an end. Such a situation was not contemplated, even in territorial days, for our statute provides that a grand juror *must* testify of his own knowledge of offenses committed, and this testimony may initiate such investigation as would lead to an indictment. RCW 10.28.130. A grand juror so testifying is disqualified from

joining in the deliberations and voting. RCW 10.28.140. Both sections assume that a grand juror so testifying is properly a member of the panel, and, as stated in *Coblenz* v. *State, supra,* any requirement that such grand juror be completely unprejudiced is inconsistent with his right and obligation to share his information with the grand jury.

To summarize this phase of the case:

1. We are unable to conclude that because a statute gave "any person in custody or held to answer for an offense" the right to challenge a grand juror for prejudice, there is a statutory or any other requirement that grand jurors be without bias or prejudice against any one indicted by them, except the persons for whose benefit that statute was enacted.

2. That, absent such statutory requirement, bias or prejudice on the part of one or more of the grand jurors is not a ground for setting aside a judgment based on a verdict of guilty returned by a petit jury.

3. There is no showing of bias or prejudice.

The charge to the grand jury is criticized and said to constitute prejudicial error. As we have indicated, a grand [fol. 2569] jury in this state is convened only for a special purpose. It was not necessary to leave to the clairvoyant powers of this grand jury the determination that they had not been called to investigate all of the persons then held in the King county jail on felony charges, as RCW 10.28.010 and 10.28.030 seem to contemplate; and it was proper to advise them that they had been called for a special purpose.

It is stated, as a general rule, that the court has a wide discretion in calling matters of concern to the attention of the grand jury. 24 Am. Jr. 864, Grand Jury, § 45; 38 C. J. S. 1012, Grand Juries, § 21(b). Some courts have said that the court's charge to the grand jury is not subject to judicial review. *United States* v. *Smyth, supra; Bethel* v. *State* (1924), 162 Ark. 76, 257 S. W. 740; *State* v. *Lawler, supra.* As Judge James Alger Fee said in his opinion in *United States* v. *Smyth, supra,* in discussing the subject of grand jury instructions (p. 292),

> " . . . He [the court] may give instructions which do not constitute precedents and which cannot be controlled or corrected by appellate courts. These may be political manifestoes. They may be entirely erroneous. These may include cautions and admonitions to fit local conditions and guard against dangers which the judge believes exist at the moment. . . . "

and, in a footnote (36), he says,

> "There has never been an instance where instruction to a grand jury was held error by an appellate court. If the indictment is good and the trial fair, that ends the matter, irrespective of what the judge may have said to the grand jury."

It must be remembered that it was not only the prerogative but the duty of the superior court to direct the grand [fol. 2570] jury's attention to those matters which the superior court judges, who had called the grand jury, believed to merit investigation by it. In so doing, it was proper for the court to make note of facts publicly known and allegations publicly heard, as a form of reference from which the grand jury should begin its investigation.

Chief Justice Vanderbilt, speaking for the supreme court of New Jersey, has said,

> "While the grand jury is an independent body in investigating the facts and in making presentments and indictments, it necessarily looks to the judge presiding in the county not only for instructions on the law to govern its deliberations in particular matters but also as to the matters of crime or of public concern that should receive its attention. Any unusual matter such as the conditions in the Camden County jail manifestly calls for specific instructions, if the criminal law is to be adequately enforced and if the public interest in the efficient administration of public institutions is to be maintained. . . . " *In re Camden County Grand Jury* (1952), 10 N. J. 23, 34, 89 A. (2d) 416, 423.

The extent of our review of the charge, if we have any right to review it, is clearly limited, as stated in the opinion

in *Wheeler* v. *State* (1953), 219 Miss. 129, 63 So. (2d) 517, to whether or not the (p. 144)

> " . . . language in the judge's charge had the effect of dictating to or coercing the grand jury into returning an indictment against the appellant. . . . "

We are unable to see any element of dictation or coercion in the charge to the grand jury in this case. The court did only what it should have done in directing the grand jury's attention to the reason why it was called.

We turn now to the claimed misconduct of the prosecutor before the grand jury. The appellant attempts to apply the [fol. 2571] standards of a trial to a grand jury investigation. Of course, the grand jury must be free from all outside interference and influence during its deliberations and voting, and this requires that no parties other than the grand jurors themselves be present at such time. Cases such as *Attorney General* v. *Pelletier* (1922), 240 Mass. 264, 134 N. E. 407; *Williams* v. *State* (1919), 188 Ind. 283, 123 N. E. 209; *United States* v. *Wells*, 163 Fed. 313 (D. C. Idaho 1908), are decided upon this principle of protection of the grand jury's deliberations, and they have no bearing on the present case.

The appellant quotes from *United States* v. *Wells*, *supra*. It is interesting to note that Judge Hand in *United States* v. *Rintelen*, *supra*, in discussing claimed misconduct of the district attorney, said of that case (p. 792),

> "The case relied upon by the defendants is United States v. Wells, 163 Fed. 313. There the district attorney not only gave the grand jury a list of the defendants and commented on the weight of the evidence, but before the indictment was signed was requested to leave the room by one of the jurors, so that there could be discussion, and refused to go, said that no discussion could be had until the indictment was signed, directed the foreman to sign the indictment without permitted further consideration or reading of the indictment, and withheld various documents from the inspection of the grand jury, the contents of which they were obliged to take from the statements of the district at-

torney only. It is manifest that the facts of that case were utterly different from those of the case at bar. The indictment there was evidently controlled by the district attorney, was not the finding of the grand jury, and consequently the plea in abatement was there properly sustained. I am referred to no other decision than United States v. Wells, supra, where an indictment has been held bad by reason of the conduct of a district attorney before the grand jury."

Judge Hand then emphasized that the independence and [fol. 2572] freedom from coercion on the part of the grand jurors is the thing to be protected, and said (pp. 794, 795),

"... A plea based on the conduct of the district attorney before the grand jury should be adjudged insufficient unless it clearly shows prejudice to the defendant and indicates that the alleged irregularities affected the action of the grand jury. That this is the proper rule appears from various decisions. Agnew v. United States, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624; United States v. American Tobacco Co., 177 Fed. 774; United States v. Nevin, 199 Fed. 833; United States v. Gradwell, 227 Fed. 243. The dictum in United States v. Wells, supra, so far as it is not in accord with the rule I have laid down, does not follow the weight of authority."

He said, also, that if

"... a comment by the district attorney, on the testimony were held in itself to invalidate an indictment, the opportunity for technical motions and dilatory pleas would be greatly enlarged."

Where the prosecutor is properly in attendance during the examination of witnesses, we find a significant lack of precedents concerning judicial review or control of his conduct of such examinations. The conclusion must be that the examination of witnesses before a grand jury has never been intended to be a matter of judicial control as in the examination of witnesses before a petit jury.

Nor does this constitute any surprising gap in the framework of our system of criminal justice. Beyond enforcing the requirements that the grand jurors be so drawn and impaneled as to be representative of the community from which they come (*State ex rel. Murphy* v. *Superior Court for Whatcom County* (1914), 82 Wash. 284, 144 Pac. 32), and that they be given the opportunity to deliberate in secrecy and in freedom from any compulsion, we find very [fol. 2573] little control exercised over what goes on in the grand jury room. No case is known in which due process considerations have been applied to the procedures by which a grand jury reached an indictment.

Judge Learned Hand gives the reason in these words,

> "One purpose of the secrecy of the grand jury's doings is to insure against this kind of judicial control. They are the voice of the community accusing its members, and the only protection from such accusation is in the conscience of that tribunal. Therefore, except in sporadic and ill-considered instances, the courts have never taken supervision over what evidence shall come before them, and, with certain not very well-defined exceptions, they remain what the Grand Assize originally was, and what the petit jury has ceased to be, an irresponsible utterance of the community at large, answerable only to the general body of citizens, from whom they come at random, and with whom they are again at once merged. A court shows no punctilious respect for the Constitution in regulating their conduct. We took the institution as we found it in our English inheritance, and he best serves the Constitution who most faithfully follows its historical significance, not he who by a verbal pedantry tries a priori to formulate its limitations and its extent. . . . " *In re Kittle, supra.*

In conclusion, we would emphasize again that the grand jury makes accusations; that it does not determine guilt or innocence. The trial courts then take over, and it becomes the burden of the state to prove the guilt of the person indicted.

Were we in a jurisdiction in which a grand jury was mandatory, we would be compelled to hold that there had

been no violation of the defendant's right to a grand jury in the present case. If we assume, *arguendo*, that there are sufficient irregularities in the present case to require such a jurisdiction to quash the indictment, then, since there is no constitutional or statutory right to a grand jury in this [fol. 2574] state, we are unable to understand how such irregularities could be of prejudice to the appellant. We find no violation of appellant's constitutional, statutory, or common-law rights in the present grand jury proceedings.

II. Motions for a Continuance and a Change of Venue.

A. Continuance:

The indictment was returned by the grand jury on July 12, 1957. The trial began five months, lacking ten days (December 2, 1957), later. The trial had originally been set for October 28, 1957, but was continued for more than a month on the representation that additional time was necessary for the appellant to prepare his defense.

There is no undue haste here, and no claim that there was not adequate time for the preparation of a defense. The appellant wanted further continuances on the ground that the inflammatory publicity concerning appellant had created an atmosphere in which it was impossible for him to obtain a fair trial.

The only statutory ground for a continuance is found in RCW 10.46.080, which has to do with the absence of material evidence, and it has no significance here. We have, however, reviewed orders denying a continuance on grounds similar to those urged here. See *State* v. *Collins* (1957), 50 Wn. (2d) 740, 743, 314 P. (2d) 660. In the *Collins* case we said that the granting of the requested continuance was discretionary with the trial court. We find no abuse of discretion here.

[fol. 2575] The appellant tries to apply the *ex post facto* test of the number on the jury panel who admitted prejudice. Appellant fails to make clear that all such prospective jurors were excused, and that thirteen jurors were selected and accepted by both sides within a very reasonable time. All of the fifty-five people who were examined on *voir dire* as prospective jurors had, of course, heard of the case

either through television, radio, or the newspapers, but only nineteen were excused for prejudice.

It is the law of this state that the fact that a prospective juror "has formed or expressed an opinion upon what he may have heard or read," shall not disqualify him; and to excuse a prospective juror for "cause"

> " . . . the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially." RCW 4.44.190.

As Judge Geraghty said in *State* v. *Patterson* (1935), 183 Wash. 239, 245, 48 P. (2d) 193,

> " . . . It is reasonable to suppose that it was difficult to select a panel of twelve men and women who had not heard or read about the case and formed some opinion or received some impression concerning the event. Under present-day conditions, to select a jury with minds free from some such tentative opinion or impression would be possible only by drawing the panel from hermits or illiterates, and even these would not be isolated from information conveyed by the radio."

In that case, we held that the proper test to be applied to a prospective juror is not whether or not he has an opinion, but whether he can, notwithstanding an opinion, disregard it and render a fair and impartial verdict according to the evidence.

[fol. 2576] The record of the *voir dire* examination of those called as prospective jurors negates any contention that a continuance was necessary to insure the appellant a fair trial, and justifies the statement of Judge Malcolm Douglas (on November 26, 1957), in denying the motion for a continuance:

> " . . . I am not at all impressed with your contention that Dave Beck, Sr., cannot have a fair trial in this community at this time. I believe arguments such as these do poor credit to the intelligence and fairness of the high-calibered jurors that we have in this community, and I am satisfied from observing the trial of cases for many years here and observing the type and

quality of jurors that we have had . . . that it is possible to find 12 jurors who can give a defendant, including this defendant, just as fair a trial in December as one could be found to give him in May. . . . "

B. Change of Venue:

The appellant urges that it was prejudicial error to refuse his application for a change of venue to Snohomish or Whatcom county.

The procedure for a change of venue is set forth in RCW 10.25.070, which reads as follows:

> "The defendant may show to the court, by affidavit, that he believes he cannot receive a fair trial in the county where the action is pending, owing to the prejudice of the judge, or to excitement or prejudice against the defendant in the county or some part thereof, and may thereupon demand to be tried in another county. The application shall not be granted on the ground of excitement or prejudice other than prejudice of the judge, unless the affidavit of the defendant be supported by other evidence, nor in any case unless the judge is satisfied the ground upon which the application is made does exist."

To conform to the statutory requirement where the motion is based on "excitement or prejudice against the defendant," the affidavit of the defendant must be "supported [fol. 2577] by other evidence," and such a motion will not be granted "unless the judge is satisfied the ground on which the application is made does exist."

The affidavit of the appellant was not supported by evidence other than newspaper headlines and stories. The affidavit in support of the motion was based on an alleged belief that the hostility and prejudice against him was less extreme and less intense in the counties of Whatcom and Snohomish than it was in King county.

Appellant refers to this as an uncontroverted affidavit. The state could not well controvert what appellant believed.

The only case in which we have reversed a conviction for failure to grant a change of venue was *State* v. *Hillman* (1906), 42 Wash. 615, 85 Pac. 63. There, the affidavit set

forth the content of inflammatory newspaper articles and alleged the fact (p. 618),

> " . . . that there was an organization known as the 'Hillman Victim Association,' composed of a large number of people, organized for the purpose of creating public sentiment against appellants, and particularly against appellant Hillman, which said association by means of public meetings and individual efforts, and by mailing postal cards reflecting upon the character of said Hillman, . . . "

Also the opinion points out that (p. 618),

> " . . . There was one affidavit signed by something over thirty residents of King county, wherein the affiants stated that they had read the unfavorable comments in the newspapers, and had heard them discussed by large numbers of people; that said articles and discussion dealt with the innocence or guilt of the defendants, and that the same were most always unfavorable to defendants; that the comments caused by said publications had been so widely spread that the public mind, in their opinion, was prejudiced to such an [fol. 2578] extent that a fair trial could not be had in the county; that they had heard of the organization formed for the purpose of harassing said Hillman in the courts, and elsewhere, and that the efforts of said association were reported to be very injurious to said Hillman."

In the *Hillman* case we have allegations of fact, which, if not true, could have been controverted. Here we have only legal conclusions based upon information and belief, not capable of contravention.

Even where the alleged offenses have been accompanied by a great deal of public indignation and prejudice against the accused, the appellate court will not disturb a determination by the trial court that a change of venue should not be granted in the absence of a showing of a manifest abuse of discretion. *State* v. *Guthrie* (1936), 185 Wash. 464, 56 P. (2d) 160; *State* v. *Schneider* (1930), 158 Wash. 504,

291 Pac. 1093; *State* v. *Schafer* (1930), 156 Wash. 240, 286 Pac. 833; *State* v. *Lindberg* (1923), 125 Wash. 51, 215 Pac. 41; *State* v. *Wright* (1917), 97 Wash. 304, 166 Pac. 645; *State* v. *Welty* (1911), 65 Wash. 244, 118 Pac. 9.

In the *Lindberg* case, the accused was a director of a bank which had failed. It had a great many stockholders and many more depositors, and the failure was a matter of great public interest and concern. The court there said (p. 54),

> " . . . This affidavit is uncontroverted and contains recitals from which it can be inferred that prejudice to some extent existed in certain parts of the county against the officers generally of the particular bank, and were the question one on which this court could exercise an independent judgment, we are free to say that it would be permissible to reach a conclusion different from that reached by the trial court. But the question [fol. 2579] is not one of the first instance in this court. By the express provisions of the statute (Rem. Comp. Stat. §§ 2018, 2019) [P.C. §§ 9397, 9398], the question is vested in the first instance in the discretion of the trial court, and we can review its ruling only for gross abuse. . . . "

The court then used a long quotation from *State* v. *Welty, supra,* which has been repeated enough times to fill twenty pages of our reports. (We adopt it but do not repeat it.) Our conclusion in the *Lindberg* case was that we found nothing warranting a holding that the trial court grossly abused its discretion, and then said (p. 55),

> " . . . The purpose of a change of venue is to secure to the accused a trial before an impartial jury, and if the record does not disclose affirmatively that the accused did not have such a trial, it is very persuasive of the fact that the trial court did not err in denying the change. . . . "

We find, in the present case, no abuse of discretion by the trial court in denying the motion for a change of venue; and this is bolstered by our conclusion, after having studied the entire record, that the defendant did, in fact, have a fair trial.

III. Right to Use of Grand Jury Transcript.

William F. Devin, one of the special deputy prosecuting attorneys before the grand jury, testified concerning certain statements made by the appellant in his testimony before the grand jury. Mr. Devin was testifying not from any document or transcript, but from his recollection of answers given by appellant.

The appellant urges that he was entitled to a transcript of his entire testimony before the grand jury to facilitate his cross-examination of Mr. Devin. He cites no authorities [fol. 2580] in support of such a proposition. He passes but lightly on the fact that the trial court did make available to appellant's attorneys that portion of appellant's testimony before the grand jury which varied from Mr. Devin's recollection thereof.

A defendant is not entitled, as a matter of right, to a copy of the transcript of his testimony before a grand jury; and the extent to which such a transcript will be made available to him is within the sound discretion of the trial court. *State* v. *Ingels* (1940), 4 Wn. (2d) 676, 104 P. (2d) 944; *State* v. *Morrison* (1933), 175 Wash. 656, 27 P. (2d) 1065. This is likewise the rule in the Federal courts. *Pittsburgh Plate Glass Co.* v. *United States* (1959), 360 U. S. 395, 79 S. Ct. 1237, 3 L. Ed. (2d) 1323.

The appellant has cited cases such as *Jencks* v. *United States* (1957), 353 U. S. 657, 77 S. Ct. 1007, 1 L. Ed. (2d) 1103, and *Powell* v. *Superior Court* (1957), 48 Cal. (2d) 704, 312 P. (2d) 698, which have to do with the making available to a defendant the written statements by witnesses or confessions of the defendant in the possession of the prosecution.

The United States Supreme Court has recently (June 22, 1959) ruled that the *Jencks* decision does not encompass grand jury minutes. In *Pittsburgh Plate Glass Co.* v. *United States, supra,* the trial judge refused the defense the right to inspect grand jury testimony of a key government witness. The supreme court held that the determination of such an issue was committed to the sound discretion of the trial judge; and that the defendant was entitled to [fol. 2581] such a disclosure only where the ends of justice required setting aside the public policy of maintaining the

secrecy of the grand jury proceedings. The burden is on the defendant to show a particularized need for it. *United States* v. *Proctor & Gamble Co.* (1958), 356 U. S. 677, 78 S. Ct. 983, 2 L. Ed. (2d) 1077.

We have recently explored the whole area covered by the *Jencks* case in *State* v. *Thompson* (1959), 154 Wash. Dec. 91, 338 P. (2d) 319, and concluded that it was a matter in the discretion of the trial court whose action will not be disturbed on appeal unless there is a manifest abuse of that discretion. We are convinced that the trial court properly exercised its discretion in allowing the defendant only limited access to the transcript of his testimony before the grand jury.

IV. The Propriety of the Prosecution's Conduct Toward Defense Witnesses.

The gist of four assignments of error is that the claimed prejudicial conduct of the prosecuting attorney toward appellant and his witness Marcella Guiry entitled him to a new trial. The claim is that in each instance "the prosecution attempted to influence the jury by improper tactics relating to the right against self-incrimination."

We will consider the situations separately. The witness Marcella Guiry was the appellant's secretary. Before the grand jury she had invoked the fifth amendment and declined to testify as to certain matters, but at the trial she did testify as to those matters.

[fol. 2582] She was asked, on cross-examination, if her answer to certain questions before the grand jury were the same as her answers in court. The appellant's claim was that she either had to say "no," or disclose the fact that she had invoked the fifth amendment, and that either would be prejudicial. She was never placed in that position because an objection was sustained to the question. Appellant urges, however, that the asking of the question was prejudicial error; and relies on *State* v. *Emmanuel* (1953), 42 Wn. (2d) 1, 253 P. (2d) 386, and *State* v. *Carr* (1930), 160 Wash. 83, 294 P. (2d) 1016. These were cases of persistent misconduct and are not applicable here. There was, here, no effort to pursue the matter further after the objection was sustained.

In such a situation as this, the judgment of the trial court in passing upon the motion for a new trial must be accorded great weight. The trial judge is able to observe any reaction of the jurors unfavorable to appellant by reason of misconduct of counsel, and is in a much better position than is this court to determine whether it has been prejudicial. *Discargar* v. *Seattle* (1948), 30 Wn. (2d) 461, 191 P. (2d) 870; *State* v. *Van Luven* (1945), 24 Wn. (2d) 241, 163 P. (2d) 600; *O'Neil* v. *Crampton* (1943), 18 Wn. (2d) 579, 140 P. (2d) 308; *Marlowe* v. *Patrick* (1935), 181 Wash. 647, 44 P. (2d) 776. The trial court did not see any prejudicial misconduct in the asking of the question to which an objection was sustained; and we find no abuse of discretion in his refusal to grant a new trial in consequence of the claimed misconduct.

[fol. 2583] We turn now to the appellant's contention, regarding his own examination. When he took the stand, he limited his testimony rather rigidly to matters concerning his official position with various labor organizations, such as the International Brotherhood of Teamsters, the Western Conference of Teamsters, and the Joint Council of Teamsters; the location of his offices in Washington, D. C., and Seattle; his employment of the accountancy firm of Friedman, Lobe & Block for his personal financial books and records. He did not testify with respect to the transaction, which was the basis of the indictment.

No objection was made during the appellant's cross-examination, except that the matter inquired about was immaterial, irrelevant, and beyond the scope of the direct examination. (There is one exception concerning which we will make special reference.)

He testified, over objection, that Mrs. Marcella Guiry took care of his books so far as the B & B Investment Company was concerned; that he could not identify her handwriting on certain exhibits; that certain accounts seemed to be in connection with his business; that there was a sale of property with Callahan, but he did not recall the details; that he authorized the sale of a Cadillac, and the amount received was nineteen hundred dollars; that the money was deposited in the B & B Investment Company account.

All of which was entirely consistent with the appellant's theory of the case.

[fol. 2584] Objections were sustained to questions as to whether he drove the 1952 Cadillac; when the final payment was made on the sale of the Beck-Callahan property; and whether appellant was in town when the proceeds of the sale were deposited in the B & B Investment Company account.

When the question of "who sold the car, do you know?" was asked, counsel for appellant asked that the jury be excused, and stated to the court in the absence of the jury,

> "That question being outside the scope of the direct examination and having been asked by Counsel, and since it is in effect a comment on the defendant's failure to testify with respect to the car and violates his constitutional right, I move for a mistrial."

The motion was denied, and the objection sustained on the ground that it went beyond the scope of the direct examination.

Appellant urges that the rule is that the cross-examination of a defendant who takes the stand is limited to subjects to which the defendant testified, and that examination beyond the scope of the direct examination, in such cases, constitutes a violation of the defendant's right against self incrimination.

When a defendant takes the stand in his own behalf he is subject to the same rules on cross-examination as other witnesses. *State* v. *Putzell* (1952), 40 Wn. (2d) 174, 242 P. (2d) 180; *State* v. *Jeane* (1950), 35 Wn. (2d) 423, 213 P. (2d) 633; *State* v. *Ternan* (1949), 32 Wn. (2d) 584, 203 P. (2d) 342; and, if he opens up a subject on direct examination, he can be cross-examined thereon. *State* v. *Johnson* (1935), 180 Wash. 401, 40 P. (2d) 159; *State* v. *DeGaston* (1940), 5 Wn. (2d) 73, 104 P. (2d) 756.

[fol. 2585] The latitude to be allowed on cross-examination is within the sound discretion of the trial court. *State* v. *Schneider, supra; State* v. *Jeane, supra.* The trial court adequately protected the appellant.

The appellant is urging, as in the case of Mrs. Guiry, that, even though objections were sustained, the asking of the questions in itself constituted prejudicial error.

Appellant again relies on *State* v. *Emmanuel, supra,* together with *State* v. *Carr, supra;* but the circumstances which warranted reversal in those cases are readily distinguishable from those with which we are here concerned.

We fail to find any indication that appellant's right against self-incrimination was violated, or that the court abused its discretion in its handling of his cross-examination.

V. Admission of State's Exhibits Nos. 17 and 18.

The issues raised by the appellant's objections to state's exhibits Nos. 17 and 18 must be examined against the background of the circumstances, and the position of the state and the appellant with reference to them.

It is not disputed that the nineteen hundred dollars, which the appellant is charged with having embezzled, was deposited February 3, 1956, in a bank account of which he was the sole owner, the account being in the name of the "B & B Investment Co."

How this nineteen-hundred-dollar item was entered in the records of the "B & B Investment Co." became the subject of controversy. The state insisted that the nineteen-hundred-dollar item was entered in the "B & B Investment Co." records as the proceeds of the sale of Beck-Callahan [fol. 2586] property. This would support an inference of an intention to conceal the real source of the nineteen hundred dollars.

It is conceded that the "B & B Investment Co." was disposing of real property known as the Beck-Callahan property, and $16,900 had been received by the "B & B Investment Co." from that source in January of 1956.

The state's evidence in support of its position was exhibit No. 17, a photostatic copy of a work sheet prepared in March, 1957, by Carl E. Houston, an accountant employed by the accounting firm which was preparing the appellant's 1956 income tax return. Taking his information from the "B & B Investment Co." ledger sheet or journal (a loose-leaf record), he entered on his work sheet

under "Sales of real estate and other assets Beck/Callahan $16,900.00," as part of the January, 1956, receipts and "Beck/Callahan $19,000.00," as part of the February receipts. He discovered his error as to the latter amount, and changed it to $1,900.00.

The defense was urging that Houston had made a mistake, and that the actual entry in the "B & B Investment Co." ledger sheet or journal for February, 1956, was "Sale Cadillac Auto $1,900.00," as shown by defendant's exhibit No. 22, which the defense claimed to be the ledger sheet or journal from which Houston secured his information.

If Houston did make a mistake, it was not discovered until after he had testified before the grand jury, and his [fol. 2587] work sheet had been before that body and had been photostated. State's exhibit No. 17 was the photostatic copy of that work sheet. The actual work sheet remained in the possession of the accounting firm until produced at the trial. At that time it appeared that the nineteen hundred dollar item had been moved from "Sales of real estate and other assets Beck/Callahan" to a new heading of "Sale of Auto." With this change, the original work sheet was admitted as state's exhibit No. 18.

Houston testified that it was as a result of the grand jury investigation that the accountants first discovered that the nineteen hundred dollar item came from the sale of an automobile. After his testimony before the grand jury, he did not again examine the "B & B Investment Co." ledger sheet or journal until in August or September, 1957. On his re-examination he found the entry "Sale Cadillac Auto $1,900.00," as shown in defendant's exhibit No. 22, and then made the change, to which we have referred, on state's exhibit No. 18.

One can believe that Houston made a mistake in March, 1957, and that exhibit No. 22 is the original and only ledger sheet or journal; or he can believe that Houston copied correctly what he saw in March, 1957, and that Marcella Guiry prepared a new ledger or journal sheet and substituted it for the original after the grand jury investigation and before the trial. All entries on exhibit No. 22 are in her handwriting, and such a substitution would have been possible.

[fol. 2588] It must be remembered that the ledger sheet or journal of the "B & B Investment Co." was a part of the books and records of the appellant, which the state could not subpoena or demand that he produce for the reason that it was beyond the power of the court to enforce the demand. *State* v. *Morden* (1915), 87 Wash. 465, 151 Pac. 832; *State* v. *McCauley* (1897), 17 Wash. 88, 49 Pac. 221. To make such a demand in the presence of the jury would be error warranting a reversal. *State* v. *Jackson* (1915), 83 Wash. 514, 145 Pac. 470.

We are satisfied that the state's exhibits Nos. 17 and 18 were admissible as secondary evidence, and the best available to the state of what the appellant's records showed as to the source of the nineteen hundred dollars. *Hartzog* v. *United States* (1954), (4th C.A.) 217 F. (2d) 706; *Lisansky* v. *United States* (1929), (4th C. A.) 31 F. (2d) 846, 67 A. L. R. 67. Its weight was for the jury.

The defense urged that when it offered the ledger or journal sheet (defendant's exhibit No. 22), it was the best evidence, and secondary evidence was not admissible. That, of course, assumed the authenticity of exhibit No. 22. The state was not bound by, nor was the jury obliged to believe, Mrs. Guiry's testimony that she had made the entry "Sale Cadillac Auto $1,900.00" in the first part of March, 1956; and that she had not seen the ledger or journal sheet in question since March, 1957. until she saw it in the court room. *Unosawa* v. *Wright* (1954), 44 Wn. (2d) 777, 270 P. (2d) 975.

[fol. 2589] Neither does Houston's present opinion, that he made a mistake (based as it is on his assumption of the authenticity of exhibit No. 22), nullify the inference to be drawn from his original entry on his work sheet, which he believed to be correct at that time.

All of the evidence by both sides on the issue of how this nineteen-hundred-dollar item had been carried in the appellant's records was before the jury. Whether or not Houston's original entry on his work sheet was a correct one, or was an error, was for the jury. *Burrill* v. *S. N. Wilcox Lumber Co.* (1887), 65 Mich. 571, 32 N. W. 824.

VI. Separation of the Jury.

The defendant invoked RCW 10.49.110, prohibiting the separation of jurors. He argues that the jurors were permitted to separate, and that prejudice to the defendant is conclusively presumed therefrom.

The specific instances referred to in plaintiff's brief are four:

1. Juror No. 3 was observed talking with two nonjurors, a woman and an elderly man.

2. Juror Eleanor Eaken conversed with her husband.

3. On one visit by her husband to juror Eleanor Eaken, he was accompanied by their son.

4. Juror Frank Walton conversed with his wife.

In every instance, the claimed separation was no more than a communication with a nonjuror (wife, husband, or [fol. 2590] son of the juror) relative to family matters or the needs of the juror; it was, in each instance, in the presence of a bailiff, and there was no physical separation from the other jurors.

In our earlier decisions we placed a very narrow meaning on the word "separation." In *State* v. *Morden, supra,* the state and the defendant had agreed that over a weekend the jurors in the charge of the bailiffs, might attend a church service and go to a theatre. On Sunday afternoon, eleven jurors, with one of the bailiffs, went to see a movie. The other juror, having (p. 475)

> "... conscientious scruples against attending places of amusement on Sunday, remained outside within the portico or porch of the theater building during that period...
>
> "Affidavits of the juror and bailiff who remained outside the theater were produced to the effect that, during the period of separation, they had no conversation with any one...."

We held that this was a separation within the purview of the statute.

By 1918, we were questioning that interpretation; and in *State* v. *Harris* (1918), 99 Wash. 475, 477, 169 Pac. 971, we said,

> ". . . The statute making women eligible to jury service of itself necessitated, and was of itself, a change in the existing system relating to the separation of juries. In trials protracted over considerable periods of time, the rules of society, propriety, and common decency require that mixed juries be allowed to separate according to sexes at stated intervals during its progress.
>
> "It may be questioned, moreover, whether the courts have not placed a too narrow construction on the word 'separate' as used in the statutes. The object and purpose of keeping them sequestered is, and has always been, to keep them from being influenced with reference to the matters given them in charge, by ulterior practices. This purpose is as well accomplished when the jury are kept singly under the charge of sworn officers of the court as it is when they are kept under like officers in a body."

Later decisions have further deviated from the strict in- [fol. 2591] terpretation of the *Morden* case, and have permitted the physical separation of jurors in the custody of bailiffs, or under circumstances where no possible prejudice could result. *State* v. *Hunter* (1935), 183 Wash. 143, 48 P. (2d) 262; *State* v. *Stratton* (1933), 172 Wash. 378, 20 P. (2d) 596.

While conversations, such as occurred in this case at the open door of the jury dormitory and on one occasion on the street near the court house door as the jurors were going to dinner, should be avoided, they do not constitute a separation of the jury, but, rather, "Communication with or by jurors." It was so categorized in *State* v. *Rose* (1953), 43 Wn. (2d) 553, 262 P. (2d) 194, where jury misconduct was discussed under three categories: (a) Entry of jury room by unauthorized person with a document for a juror; (b) Communications with or by jurors; (c) Separation of jury.

But, giving the appellant the benefit of the more rigid rules and the *prima facie* presumption of prejudice that follows upon a separation or upon a communication between a juror and a nonjuror, the burden is on the state to show that no prejudice actually resulted. *State* v. *Rose, supra; State* v. *Smith* (1953), 43 Wn. (2d) 307, 261 P. (2d) 109; *State* v. *Amundsen* (1950), 37 Wn. (2d) 356, 223 P. (2d) 1067.

Here, the state did sustain that burden and established that every conversation between a juror and a nonjuror was in the presence of a bailiff, and that the subject matters of the conversations could not have been in any way preju- [fol. 2592] dicial to the appellant. Under such circumstances, we will not disturb the order of the trial court in refusing to grant a new trial. *State* v. *Smith, supra; State* v. *Carroll* (1922), 119 Wash. 623, 206 Pac. 563; *State* v. *White* (1920), 113 Wash. 416, 194 Pac. 390.

VII. Deprivation of a Peremptory Challenge.

Appellant urges that Raymond Kraatz, contrary to his testimony on *voir dire,* was actually hostile to the Teamsters Union. The appellant was forced to use a peremptory challenge to keep Kraatz off of the jury.

Evidence of the prospective juror's claimed duplicity was brought to the attention of the trial court for the first time in the motion for a new trial. It is the appellant's contention that had the juror's true attitude been known to the court during the *voir dire* examination of Kraatz, he would have been excused for cause; and appellant would have thus been saved a peremptory challenge.

The purpose of the *voir dire* examination is to enable the parties to learn the state of mind of the prospective juror, and to demonstrate, if possible, that the prospective juror is subject to a challenge for cause. The appellant does not contend that any basis was developed for a challenge for cause in the examination of Kraatz.

Had Kraatz served on the jury, and had it developed that the appellant had been deceived by his false answers to questions on *voir dire,* an entirely different question [fol. 2593] would be presented; but, even were that the claimed situation, the bias of the juror would have to be

established by something more reliable than hearsay affidavits. *Casey* v. *Williams* (1955), 47 Wn. (2d) 255, 287 P. (2d) 343; *State* v. *Maxfield* (1955), 46 Wn. (2d) 822, 285 P. (2d) 887; *State* v. *Patterson, supra; State* v. *Dalton* (1930), 158 Wash. 144, 290 Pac. 989; *State* v. *Simmons* (1909), 52 Wash. 132, 100 Pac. 269; *State* v. *Wilson* (1906), 42 Wash. 56, 84 Pac. 409.

Here, Kraatz did not deceive the appellant; he was, in fact, excused. That, after all, is what peremptory challenges are for. The purpose of such challenges is to get off of the jury the person whose bias a party knows or suspects but can't establish on his *voir dire* examination. If we assume the bias of Kraatz, it would be a new development in the field of criminal law to hold that a defendant, who had used all of his peremptory challenges, was entitled to a new trial if he could show, at some time before the motion for a new trial was argued, that one of the prospective jurors (excused by a peremptory challenge) had an actual bias.

Appellant has presented no authority for such a holding, and we are satisfied there is none.

VIII. There Was Insufficient Evidence to Convict.

The statute under which this prosecution is brought is as follows:

> "Every person who, with intent to deprive or defraud the owner thereof—
>
> ". . .
>
> ". . .
>
> "(3) Having any property in his possession, cus- [fol. 2594] tody or control, as bailee, . . . agent, . . . trustee, . . . or officer of any . . . association or corporation, . . . shall secrete, withhold or appropriate the same to his own use . . .
>
> ". . .
>
> ". . .
>
> "Steals such property and shall be guilty of larceny." RCW 9.54.010.

It is appellant's contention that, at most, the state's case showed receipt by him of the nineteen hundred dollars from the sale of the car, and a failure to account therefor; and, since the intent to appropriate the money and deprive the owner of it was not established, there was not sufficient evidence to prove embezzlement.

A similar contention was made in *State* v. *Campbell* (1918), 99 Wash. 502, 164 Pac. 968, where the prosecution was under the same statute. A syllabus in that case states the facts and applicable rule concisely:

> ". . . In a prosecution for the embezzlement of the proceeds of a note and mortgage delivered to the accused for the purpose of collection, intent to deprive the owner of the property is sufficiently established by the fact that accused sold the note and mortgage to a third person and converted the proceeds to his own use."

The following quotation from the opinion amplifies the reasoning summarized in the syllabus (pp. 504, 505):

> "It is next urged that there was no direct and specific evidence tending to prove an intent on the part of appellant to deprive Mrs. Fuchs of her property. No instrument has yet been invented by means of which the inner workings of the human mind may be revealed; hence criminal intent, in the vast majority of cases, is not capable of direct and positive proof. In the absence of an express declaration thereof, a criminal purpose can only be established as an inference from a tion and conduct—the external manifestations of design. Since, in embezzlement, the necessary effect of the wrongful conversion is to deprive the owner of [fol. 2595] his property, the act of appropriation gives rise to the inference that the perpetrator intended the inevitable result of his conduct. In this case, the intent to defraud was evidenced by the act of the appellant in selling the note and mortgage to a third person and converting the proceeds to his own use or to the use of Colin Campbell Security Company, instead of faithfully executing his trust by collecting the amount se-

cured by the mortgage and accounting therefor to Mrs. Fuchs. . . ."

A stronger case for the appellant-defendant was made in *State* v. *Jakubowski* (1913), 77 Wash. 78, 87, 137 Pac. 448, where we said,

". . . In our statement of the case, we have detailed every salient feature of the evidence, and while it appears to this court as persuasively negativing a criminal intention on the appellant's part, its weight and the credibility of the appellant and his witnesses were for the jury. As we have seen, there was adduced by the state competent evidence tending to prove every element of the crime as charged. The trial court denied the appellant's motion in arrest of judgment and refused to grant a new trial upon conflicting evidence. In such a case, whatever our own opinion as to the weight or preponderance of the evidence, we cannot reverse the action of both the trial court and the jury. To do so would be to invade the province of both. It would be to substitute our judgment for that of the jury as to a question of fact upon conflicting evidence, and our discretion for that reposed by statute in the trial court.

"'This court has heretofore announced that it will not disturb verdicts of this character, on the ground of alleged insufficiency of evidence, where there is evidence to support the verdict, although it may not be of the most convincing kind. Both the jury and the trial court have the opportunity to hear and see the several witnesses, to note their manner as to apparent candor and truthfulness, and are therefore better prepared to pass upon the credibility of their testimony than is this court with only a bare record of the words spoken by the witnesses. The weight of the evidence having been first passed upon by the jury, and next by the trial judge in denying the motion for new trial, we shall not undertake to say that they were wrong.' *State* v. *Ripley*, 32 Wash. 182, 72 Pac. 1036."

See also *State* v. *Dudman* (1922), 119 Wash. 522, 205 Pac. 848.

The court instructed the jury (and no error has been assigned to the instruction):

> [fol. 2596] "I instruct you that the intent to deprive or defraud, which is one of the elements of the offense of grand larceny, as charged in the Indictment in this case, must be proved by competent evidence beyond a reasonable doubt. However, it need not be proved by direct and positive evidence, but the existence of such intent may be inferred from the acts of the parties and the facts and circumstances surrounding them." Instruction No. 5.

It is unnecessary to again review the evidence in this case, nor is it our responsibility to weigh it. There was no doubt in the mind of the trial court, nor is there in ours, that the jury was entitled to infer the intent to deprive the Western Conference of Teamsters of the nineteen hundred dollars from the acts (which includes failure to act) of the appellant.

The evidence shows that the appellant knew as early as February, 1956, that the nineteen hundred dollars had been deposited in his bank account; that more than a year later it had not been paid over to the owner. The only semblance of an explanation came in the state's case, through the testimony of William F. Devin, as to statements made by the appellant before the grand jury, *i.e.*, that not knowing to whom the car belonged, he had given nineteen hundred dollars in cash to Fred Verschueren, Jr., with instructions to apply it to the proper account. The jury was not obligated to believe that explanation.

The appellant was clearly confronted with a *prima facie* case, and the defense presented did no more than suggest possibilities of what appellant might have done or might have intended to do with the nineteen hundred dollars, by [fol. 2597] way of explanation of why it had not been paid over to its rightful owner.

There is no merit in the assignments of error raising the issue of the insufficiency of the evidence to sustain the verdict.

IX. Misconduct of the Deputy Prosecuting Attorney in Argument to the Jury.

Two statements made by the deputy prosecuting attorney, in the course of rebuttal argument, are urged as error.

The one of which appellant makes the most bitter complaint is (p. 1332),

> "But now we get down to the point where everything is deadly serious. You have a tremendous responsibility. Counsel refers to all of this terrible publicity. It is true. The eyes of the entire world probably are upon you right now and the evidence that has been presented here against this defendant has been widespread. There is no question about that. You shou'd return a proper verdict, that is your responsibility. You are the ones that are going to have to look at yourselves the rest of your lives. You are the ones that are going to have to be with your neighbors and friends and hold your head up high and say, 'I did what my heart and mind told me.' You are not to be influenced at all by any sympathy or prejudice. Nothing at all can be considered by you except the evidence from this witness stand."

The appellant says that the purpose of that statement was to remind the jury of the great amount of adverse publicity against him, and to remind them that they ought to take into account the public clamor and its desire that the appellant be convicted; and, further, to remind them that if they returned a verdict of not guilty, they would be held up to public disfavor and ridicule.

We do not so interpret the statement by the deputy prosecuting attorney. Comment on the matter of publicity was [fol. 2598] invited by the emphasis that appellant's counsel placed on it in his argument in such statements as (p. 1266),

> " . . . the rumors and the gossip and the frenzied, insane propaganda that could have been created only by somebody with the insanity of a Goebels. . . . "

and,

> " . . . the tremendous amount of unfavorable publicity that has been circulated about Mr. Beck, almost to the point of saturation of the public press and the radio and the newspapers, repeated and repeated and repeated; the Nazi system."

Even in the portion of the argument objected to, the deputy prosecuting attorney tells the jury,

> " . . . You are not to be influenced at all by any sympathy or prejudice. Nothing at all can be considered by you except the evidence from this witness stand."

The other statement of the deputy prosecuting attorney, concerning which complaint is made, has to be placed in context to be understoood.

Appellant's counsel had been at some pains to explain to the jury why he did not call Fred Verschueren, Jr., as a witness. (Verschueren, Jr. was the person to whom appellant supposedly had given the nineteen hundred dollars to turn over to the owner of the 1952 Cadillac.) Commenting on counsel's explanation, the deputy prosecuting attorney said (p. 1316),

> "He tells us that he wants to protect Mr. Verschueren, Jr. Mr. Verschueren, Jr., you will recall, testified before the grand jury. There was testimony to that effect here. *Mr. Beck testified before the grand jury and the grand jury wasn't made up of four ogres who were breathing down the neck of anybody. It was made up of seventeen people just like you, seventeen citizens selected to sit on that grand jury and seventeen people* [fol. 2599] *after they heard the testimony of Mr. Regal and Mr. Verschueren, Jr. returned an indictment and that is what you are trying here today.*
>
> "Now the question is, in Mr. Burdell's strategy, should he take Mr. Beck and put him on the stand and have him explain this which he didn't do and could he bring Mr. Verschueren, Jr. in to have him

explain this which he didn't do, because he felt most likely, we can assume he felt this way, if I do that, I really am sunk, so what I have to do is to try to talk the jury into assuming things from these little bits of evidence that I can bring in with witnesses of some stature in the community." (This is taken from the statement of facts. Italics are ours.)

Appellant complains of the italicized portion. (As quoted in appellant's brief, Mr. Regal is changed to Mr. Beck in the next to the last line of the italicized portion; and we will assume, for present purposes, the change to be correct.) Appellant urges that the italicized portion of the argument throws the weight and prestige of the grand jury into the scale against him. Read in context, as an answer to the appellants' explanation for not calling Fred Verschueren, Jr. as a witness, it is a proper response. We have consistently held statements of a prosecuting attorney, which would ordinarily be improper, will not be regarded as prejudicial error where they are in answer to and are invited by the argument made by defense counsel. *State* v. *Collins, supra; State* v. *Taylor* (1955), 47 Wn. (2d) 213, 287 P. (2d) 298; *State* v. *Harold* (1954), 45 Wn. (2d) 505, 275 P. (2d) 895; *State* v. *Van Luven, supra; State* v. *Wright, supra.*

Appellant does not argue, under this division of his brief, his other claim of misconduct of counsel: that the prosecutor, by an illustration used in argument (*i.e.*, that one [fol. 2600] who stole a bracelet before a court room full of people was entitled to the presumption of innocence if he went to trial), destroyed any effect of the presumption of innocence, and thereby denied him the benefit of that presumption.

We do not agree. Prosecutors have been using similar illustrations for many years, but it has never before been urged as a denial of due process.

Appellant argues this in his division X, but we have placed it with other claimed misconduct of counsel.

X. *Instructions Given and Refused*:

Up to this point, we have accepted, in substance, the headings which the appellant has given to the divisions in

his brief. Appellant's heading for division X, however, is, in effect, Denial of Due Process. He reargues briefly the errors already urged with reference to the grand jury proceeding, and asserts that the accumulative effect of the many errors constitutes a denial of due process. Having found no prejudicial error in divisions I to IX, we are not impressed with their cumulative effect.

We will, therefore, cover only the matters not heretofore urged. Appellant assigned error to instructions Nos. 2, 3, 14, and 16, but argues only as to Nos. 3 and 16. Appellant assigned errors to the failure to give his requested instructions Nos. 10, 14, and 38.

It is urged that the trial court should not have given instruction No. 3, because it merely emphasized the most [fol. 2601] favorable aspects for the state—already adequately stated in instruction No. 2.

Instruction No. 2 was the comprehensive statement of all of the elements of the offense which the state must prove before the jury could convict.

Instruction No. 3 is a definition of the crime of grand larceny by embezzlement, substantially in the words of the statute. RCW 9.84.010(3); RCW 9.54.090(6).

Under the facts of this case it was not error to instruct in the language of the statute. *State* v. *Sedam* (1955), 46 Wn. (2d) 725, 284 P. (2d) 292; *State* v. *Bixby* (1947), 27 Wn. (2d) 144, 168, 177 P. (2d) 689; *State* v. *Verbon* (1932), 167 Wash. 140, 8 P. (2d) 1083.

Appellant points out no error in instruction No. 16 on presumption of innocence and reasonable doubt, but urges that his instruction No. 10 on that subject was preferable, particularly in view of the argument of the deputy prosecutor on the presumption of innocence. (The trial court had no way of knowing when the instructions were given what the deputy prosecutor's argument would be.)

The trial court's instruction was a proper statement of the law, and seems preferable to us to the much longer and more argumentive instruction proposed by the appellant. It certainly was not error to refuse a requested instruction where the principle of law stated therein was adequately covered by the instruction given. *State* v. *Myers* (1959),

[fol. 2602] 53 Wn. (2d) 446, 334 P. (2d) 536, and numerous cases therein cited.

It is urged that, since the trial court gave instruction No. 3 (the statutory definition of grand larceny by embezzlement), it should have given appellant's proposed instruction No. 14 to the effect that the defendant could not be guilty unless there was a "definite intent to take the proceeds [of the sale of the Cadillac] from the Western Conference of Teamsters and deprive it of the money."

The element of intent was stated in instruction No. 2, and emphasized and re-emphasized in instructions Nos. 5, 7, and 9.

The jury was more than adequately instructed on the necessity of intent, and the trial court did not err in refusing to give appellant's proposed instruction No. 14. *State* v. *Myers, supra.*

Appellant's proposed instruction No. 38, after stating the presumption of innocence, said,

> "This must especially be kept in mind when any person has received unfavorable nation-wide publicity in non-judicial proceedings which have the tendency to be one-sided because the party involved has no opportunity to make any adequate defense."

In his brief, appellant says,

> "Finally, the failure of the court to grant appellant's instruction No. 38 . . . was certainly error in view of the fact no other instruction of the court told the jury to disregard the unprecedented publicity."

No authority is cited, and there is no argument beyond the statement quoted from the brief. One could not refer to this as a slanted instruction, because it is practically per- [fol. 2603] pendicular. There was no evidence in the case to which the instruction applied. The matter of unprecedented publicity was, as we have seen, injected into the case by appellant's counsel in argument to the jury. The trial court properly refused to give such an instruction. *State* v. *Hart* (1946), 26 Wn. (2d) 776, 175 P. (2d) 944; *State* v. *Powell* (1927), 142 Wash. 463, 253 Pac. 645.

The length of the record (2,400 pages), and the number and novelty of many of the issues raised on the appeal, has unduly delayed the determination of this nineteen hundred dollar grand-larceny-by-embezzlement case.

We find ample evidence to sustain the verdict and no prejudicial error in the record. The judgment appealed from is affirmed.

Hill, J.

We concur:

Weaver, C.J., Mallery, J., Ott, J.

[fol. 2604] 34636

Donworth, J. (dissenting)—In my opinion, the majority, in upholding appellant's indictment, has reached a result which is directly contrary to the settled policy of this state as determined by our legislature with respect to the impaneling of grand juries. Therefore, I cannot agree with the majority holding that appellant was not entitled, *under the laws of this state*, to have a grand jury composed of impartial and unprejudiced jurors.

In considering appellant's motion to quash the indictment, we must bear in mind that appellant was indicted by a grand jury impaneled in the state of Washington and not by a Federal grand jury or a grand jury of a state whose statutes differ from ours. However, the majority holds that the superior court need not inquire whether the prospective grand jurors entertain any prejudice against the person whose conduct the court, in its charge, directs them to investigate, and bases its holding upon decisions of the Federal courts whose grand juries need not be composed of impartial and unprejudiced jurors because no statute or rule of court so prescribes.

To fully understand the very serious problem presented by the three assignments of error quoted below, it is necessary to consider certain material facts shown by the record, which are not referred to in the majority opinion, presumably because of its view that everything that happened prior to the trial of the case is immaterial. In order to

properly consider the legal question which is presented, I consider it necessary to state these facts in some detail [fol. 2605] before coming to a discussion of the applicable statutes and decisions of this court.

The assignments of error with which we are first concerned are as follows:

> "25. The court denied appellant's rights to a fair and impartial grand jury.
>
> "26. The court erred in prejudicing the grand jury against appellant by its charge.
>
> "28. The court erred in failing to set aside the indictment for misconduct of the prosecutor before the grand jury."

In passing upon the merits of these assignments, we should have in mind the unique situation which existed during the three months immediately preceding the convening of the grand jury.

The grand jury, which returned the indictment herein, was convened on May 20, 1957. Several months prior thereto, the Senate Select Committee on Improper Activities in the Labor-Management Field (commonly referred to as the Senate Rackets Investigating Committee) commenced an investigation of certain labor unions and their officers. Needless to say, these hearings were not of a judicial nature. Ordinary rules of evidence were not applicable, nor were the witnesses subject to cross-examination. The stated object of the committee hearing was to obtain information which would aid Congress in enacting legislation bearing upon labor-management relations.

Most of the hearings were conducted in public and were widely reported by the various news media. During the period of approximately three months prior to the impanelment of the grand jury, appellant was the principal subject of charges of misconduct made in the course of the hearings. Because appellant was then, and since childhood had been, a resident of Seattle, and for the preceding thirty [fol. 2606] years had been a labor leader of national reputa-

tion,[1] this area was the focal point for the dissemination of the highly derogatory publicity concerning appellant which resulted from the committee hearings. The local press featured front-page headlines in large, heavy type, in which the more sensational excerpts from that day's testimony or other proceedings of the committee were flamboyantly displayed. The local radio and television stations carried the same material, and in several instances both media reported the hearings "live" from Washington, D. C.[2]

On March 26, 1957, and again on the following day, appellant, accompanied by counsel, appeared as a witness before the committee. Upon the advice of counsel, appellant informed the committee that he would assert the privilege against self-incrimination guaranteed him by the Fifth Amendment to the United States Constitution because of the fact that he was currently being investigated for possible violations of Federal law. The committee posed questions to appellant which he refused to answer (on the advice of counsel) on the ground that an answer might tend to incriminate him. He did so a total of one hundred fifty times during the two days of his interrogation by the committee.

On May 2, 1957, appellant was indicted in Tacoma by a Federal grand jury for alleged income-tax invasion.

On May 3, 1957, there appeared on the first page of the Seattle Post-Intelligencer a statement to the effect that

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[1] Prior to December, 1952, appellant was for many years president of the Western Conference of Teamsters, which covered eleven western states. He maintained his office in Seattle. In December, 1952, appellant became president of the International Brotherhood of Teamsters (a labor union having one and one half million members), which maintained its principal office in Washington, D. C. Thereafter, appellant continued to maintain an office in Seattle and held the official title of president emeritus of the Western Conference.

[2] An advertisement by a local television station appeared in the newspaper stating that it would report the proceedings of the Senate Committee regarding appellant exclusively "live" on Wednesday, March 27, 1957. The advertisement showed the station was going to devote approximately 9¼ hours of that day's programming to both reproductions of the Senate hearings and news comments thereon.

the prosecuting attorney had decided to name special prose-
[fol. 2607] cutors to assist him in conducting the grand jury proceedings. This article contained the following statement:

> "The grand jury is to investigate possible misuse of Teamsters Union funds by international president Dave Beck . . . "

On May 8, 1957, appellant was recalled to testify before the Senate Committee, where he was again subjected to a lengthy interrogation, during which appellant again invoked the Fifth Amendment, upon the advice of counsel, approximately sixty times.

During the course of these proceedings, the committee chairman, its counsel, and some of its members, orally stated certain conclusions and expressed opinions regarding the conduct of appellant. These comments, which were extremely derogatory to appellant, were widely circulated by all news media throughout the United States, and particularly in the Seattle area. In these comments, appellant was characterized as a thief, and it was asserted that he was guilty of fraud and other illegal conduct with respect to his management of the affairs of the teamsters' union as its principal officer in the eleven western states, and later in his position as its international president.

These conclusions and opinions (particularly those expressed by Senator McClellan, the chairman of the committee) were displayed by local newspapers on the front page in prominent headlines. The following are a few of the comments which were referred to in such headlines which appeared in Seattle newspapers:

> "TEAMSTERS' CASH KEPT GOING TO BECK AFTER HE BECAME UNION PRESIDENT, SAYS PROBER." Seattle Times, March 23, 1957.
>
> "BECK'S USE OF $85,000 MAY BE THEFT, SAYS McCLELLAN." Seattle Times, March 27, 1957.
>
> "BECK GIVES 'BLACK EYE' TO LABOR, SAYS SEN. McNAMARA." Seattle Times, March 27, 1957.
>
> "SENATE PROBE LIFTS LID ON BECK BEER BUSINESS—USE OF UNION MONEY RELATED." Seattle Post-Intelligencer, May 9, 1957.

Substantial portions of the committee proceedings relating to these charges were also reproduced in the course of news broadcasts on local radio and television stations. [fol. 2608] The amount, intensity, and derogatory nature of the publicity received by appellant during this period is without precedent in the state of Washington. A Seattle newspaper carried a news item reporting that the switchboard of a local radio station that had broadcast the committee proceedings on the preceding day was jammed with calls, and that the officials of the station characterized the response to the broadcast on the part of the public as "astounding," and that such response was greater than that resulting from any other broadcast ever aired by them. The serious accusations made by United States senators in the committee hearings are generally regarded by laymen as being official charges (which appellant had refused to answer[1]), and thus the impression was created among the general public that appellant had been found guilty of a crime. The natural effect of this publicity was that, in the eyes of the average citizen, the character of appellant had been thoroughly discredited in the Seattle area on or before May 20, 1957.

In view of the circumstances shown by the undisputed facts stated in the affidavits in this case, I think it would be unrealistic to believe that a very substantial number of the citizens of the community had not adopted, consciously or unconsciously, an attitude of bias and prejudice toward appellant at the time the grand jury was convened. If ever there was a case which required the most stringent observance of every safeguard known to the law to protect a citizen against bias and prejudice, this was it.

On July 30, 1957, appellant (who had been indicted on July 12th) filed a motion to allow him to publish and inspect [fol. 2609] a transcript of both the grand jury *voir dire* and the grand jury proceedings. Appellant filed an amended motion on September 16, 1957, supported by his counsel's affidavit, stating on information and belief that the grand jury was prejudiced and biased. On September 20, 1957,

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[1] Appellant, in so doing, was exercising a right guaranteed him by the United States Constitution. See *Hoffman* v. *United States*, 314 U. S. 479, 95 L. Ed. 1118, 71 S. Ct. 814.

the trial court entered an order granting appellant the right to publish and inspect the open court proceedings of the grand jury (*i.e.* the *voir dire* and the court's charge).

On October 18, 1957, appellant filed, along with other pretrial motions not pertinent hereto, a motion to set aside and dismiss the indictment. This motion was accompanied by his counsel's affidavit, attached to which was a compilation of photostatic copies of newspaper and magazine articles (total 139 pages) showing the nature and extent of the adverse publicity concerning appellant. On the same day, appellant also filed a challenge to the grand jury upon the grounds

> "... that the court which impaneled said grand jury made no determination as to whether a state of mind existed on the part of any juror such as would render him unable to act impartially and without prejudice."

All of these motions were argued before the superior court on November 4, 1957, and on November 7, 1957, the court entered an order denying both the motion to set aside and dismiss the indictment and the challenge to the grand jury, but directing that the testimony of Fred Verschueren, Jr., before the grand jury be transcribed, sealed, and retained in the case file, subject to disclosure only in the event of a conviction and subsequent appeal. The state's application to this court for a writ of prohibition to prevent the entry of this order was denied.

In considering the three assignments of error referred to above, I shall discuss (1) the impanelment of the grand jury, (2) the charge given the grand jury, and (3) the alleged [fol. 2610] misconduct of the prosecuting officers in the examination of a witness before the grand jury.

The Impanelment

Within five days before the prospective members of the grand jury reported to the court, the Seattle newspapers published articles with these headlines:

> "BECK APPARENTLY STOLE $300,000 FROM UNION, SAYS PROBE AIDE."

Underneath this headline is the following statement:

"Labor Probe at a Glance:

"Robert Kennedy, counsel for the Senate Rackets-Investigating Committee, said it would appear that $300,000 to $400,000 which Dave Beck 'borrowed' from the Teamsters actually was 'stolen.' (See below.)" Seattle Times, May 15, 1957.

"BECK MISUSED UNION POSITION IN 52 INSTANCES, SAYS PROBER." (There then follows in the body of the article a detailed list of 52 instances of alleged misuse by appellant of his union position.) Seattle Times, May 16, 1957.

"SENATE DOCUMENT CHARGES BECK 'TOOK' $300,000." Seattle Post Intelligencer, May 17, 1957.

"McCLELLAN BLASTS BECK FOR 'RASCALITY.'" Seattle Post Intelligencer, May 17, 1957.

The grand jury was impaneled on May 20, 1957. After explaining the general qualifications of grand jurors, the court examined each prospective member as to his or her particular qualifications to act as grand juror. These questions related to the juror's occupation, whether he had ever been a member of the teamsters' union (or any affiliate thereof) or an officer in any union. He was further asked if he were acquainted with any officer of the teamsters' union. One prospective juror was asked if he knew appellant and he replied in the negative. The final question which the court asked each prospective juror was:

"Is there anything about sitting on this grand jury that might embarrass you at all?"

The court excused five prospective jurors[4] and examined five more in the same manner. The seventeen persons then

[4] Two of the five prospective jurors excused by the court volunteered that they had been prejudiced by reading newspaper articles and seeing television broadcasts. Another was asked if he knew appellant and he replied in the negative. This was the only instance of the court's referring to appellant by name, although the court's later reference to the president of the teamsters' union undoubtedly was understood by the jurors to mean appellant.

[fol. 2611] in the jury box were accepted as constituting the grand jury and the court administered the oath to them.

It is to be noted that none of the jurors who were accepted was asked if he had read anything about the alleged activities of the officers of the teamsters' union in the Seattle newspapers or in nationally circulated magazines, particularly those articles relating to the proceedings before the Senate Committee. Neither was any juror asked if he had heard any part of these proceedings on the radio or had seen them "live" on television. Nor was there any interrogation of the jurors had to ascertain whether any of them had heard or participated in any discussions concerning these matters. The general question as to whether the jurors would be embarrassed in any way in sitting on this grand jury was, in my opinion, not sufficient to disclose any bias or prejudice (conscious or unconscious) on the part of the jurors.

In view of the unprecedented publicity which had been given to the Senate Committee hearings within the three months preceding the impanelment of the grand jury, I think that the jurors should have been interrogated for the existence of possible bias and prejudice against the officers of the teamsters' union.

The authorities bearing on this subject will be discussed after I review the court's charge to the grand jury.

The Court's Charge

The court explained the historical background and functions of the grand jury, and commented on the fact that it had been used so infrequently in this state that most people, even lawyers, were unfamiliar with its procedure and underlying purposes. The court then outlined the man-[fol. 2612] ner in which the grand jury was to perform its functions.

Th court stated the reasons for calling this grand jury as follows:

> "We come now to the purpose of this grand jury and the reasons which the judges of this court thought sufficient to justify the expense to the county, and the in-

convenience to and sacrifice by you, which this grand jury session will require.

"It seems unnecessary to review the recent testimony before a Senate Investigating Committee except to say that disclosures have been made indicating that officers of the Teamsters Union have, through trick and device, embezzled or stolen hundreds of thousands of dollars of the funds of that union—money which had come to the union from the dues of its members. It has been alleged that many of these transactions, through which the money was siphoned out of the union treasury, occurred in King County. Such crimes, if committed, cannot be punished under Federal law, or under any law other than that of the State of Washington, and prosecution must take place in King County. The necessary criminal charges can only be brought in this county upon indictment by the grand jury or information filed by the prosecuting attorney.

"The president of the Teamsters Union has publicly declared that the money he received from the union was a loan which he has repaid. This presents a question of fact, the truth of which is for you to ascertain.

"You may find that many of the transactions happened more than three years ago; this would raise the question of the statute of limitations, which ordinarily bars a prosecution for larceny after three years. There are some instances, however, where the period is extended. This is a question of law and you should be guided by the advice of the prosecutors on this and similar questions. Your investigation may conceivably result in the adoption of better standards of conduct for union officials.

"Some other inquiries suggested by the Senate investigation are the relationship between the officers of the Teamsters Union and a certain insurance broker; an alleged conspiracy between business men and Teamster officials in fixing prices; and the influence wielded by Teamster officers through campaign contributions to public officials.

"To completely investigate all of these items may be beyond the energy and endurance of yourselves, the

prosecutors and their investigating staff. The financial burden of such a complete investigation may be beyond the resources of King County. I urge you to do all that you can within practical limitations to ascertain the truth or falsity of these charges."

After designating the foreman of the grand jury, the court said:

"Now, members of the grand jury, that is all I have to say to you in the way of a formal charge. I think you all realize that your names have been selected right from the jury list which in turn is picked from the voters' registration books. You have a most serious [fol. 2613] task to perform and I know you realize it is being performed, and is to be performed, by a grand jury picked at random from among the citizens in this community, and thus we hope to keep the law close to the people. It is a tremendous responsibility, and I wish you well in your work."

The court then introduced the prosecuting attorney, one regular deputy, two special prosecuting attorneys for the grand jury and the official court reporter, and terminated its charge.[8]

While the charge contained this admonition, "Your deliberations are secret and you are forbidden by law to disclose the vote, or even the discussion, on any question before you," no warning was given the jurors about refraining from reading newspaper or magazine articles relating to officers of the teamsters' union while they were serving as grand jurors; nor was there any admonition given the grand jurors about not listening to radio or television programs pertaining to the conduct of these officers.

On the afternoon of the day that the grand jury was selected and sworn, two articles appeared in the Seattle Times concerning appellant. The headlines read:

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[8] Appellant, in assignment of error No. 27, asserts that unauthorized persons appeared before the grand jury, and contends that the indictment should be dismissed for that reason. In view of the conclusion I have reached on other assignments, I do not find it necessary to discuss No. 27.

"BECK OUSTED FROM A. F. L.-C. I. O. POSTS—TEAMSTER CHIEF FOUND GUILTY OF 'VIOLATING TRUST.'" Seattle Times, May 20, 1957.

"SOLON DENIES INFRINGING BECK'S RIGHTS." ("'May I say that the committee has not convicted Mr. Beck of any crime, although it is my belief that he has committed many criminal offenses.'") Seattle Times, May 20, 1957.

The following morning, the Seattle Post Intelligencer carried this headline:

"McCLELLAN LAYS 'MANY CRIMINAL' ACTS TO BECK." Seattle Post Intelligencer, May 21, 1957.

Between that date (May 21, 1957) and July 12, 1957, when appellant was indicted, two nationally circulated [fol. 2614] weekly magazines published articles entitled:

"THE CASE AGAINST DAVE BECK AS SENATORS SEE IT." U. S. News & World Report, May 24, 1957.

"A CITY ASHAMED—DAVE BECK IS ON SEATTLE'S CONSCIENCE." Time, May 27, 1957.

I shall now discuss the arguments of counsel relating to assignments of error No. 25 and No. 26.

The motion to set aside and dismiss the indictment was based upon *RCW 10.40.070*, which provides that an indictment *must* be set aside when it appears:

"(4) That the grand jury were not selected, drawn, summoned, impaneled, or sworn as prescribed by law."

It is appellant's contention that the grand jury was not impaneled as prescribed by law in that there was no interrogation by the trial court designed to enable it to determine whether or not any juror possessed a state of mind which would render him unable to act impartially and without prejudice. To this is added the further contention that the trial court's charge to the grand jury was prejudicial to appellant.

My examination of the portion of the record relating to these matters convinces me that appellant's contentions are well taken.

The statutes of this state relating to grand juries clearly demonstrate the legislative intent to adopt the principle that the grand jury must be impartial and unprejudiced.

> "No complainant who may institute a prosecution shall be competent to be present at the deliberations of a grand jury, or vote for the finding of an indictment." RCW 10.28.140.
>
> "Challenges to individual grand jurors may be made by such person for reason of want of qualification to sit as such juror; and when, in the opinion of the court, a state of mind exists in the juror, such as would render him unable to act impartially and without prejudice." RCW 10.28.030.

[fol. 2615] In *Watts* v. *Washington Territory*, 1 Wash. Terr. 409, this court, in overruling a challenge to the grand jury proceedings, pointed out that there had been no claim by the defendant that any of the grand jurors were biased or prejudiced.

In *State ex rel. Murphy* v. *Superior Court*, 82 Wash. 284, 144 Pac. 32 (1914), we upheld the right of the trial judge to excuse certain prospective jurors and stated:

> "That it was the policy of the legislature to preserve the right to have *an unbiased and unprejudiced* jury and *grand jury*, and that no suspicion should attach to the manner of its selection in all cases, cannot be questioned. . . ." (Italics mine.)

In *State* v. *Guthrie*, 185 Wash. 464, 56 P. (2d) 160 (1936), this court, in denying a motion to quash an indictment, cited the *Murphy* case, *supra*, and the above quotation therefrom with approval, and discussed the statute now codified as RCW 10.28.030 (quoted above) as follows:

> "While this section may be said to relate to challenges made by interested persons, it is not to be construed as denying to the court the right, upon its own motion, to excuse a juror deemed to be disqualified or

incompetent. To deny this right would be out of harmony with the policy of the law, *which charges the court with the responsibility* of insuring that qualified and impartial grand jurors are secured." (Italics mine.)

Thus, our consideration of this case should be based upon the premise that appellant, as a matter of law, was entitled to an impartial and unprejudiced grand jury. Although the state in this case does not take issue with this premise,[6] the [fol. 2616] majority holds that appellant is not concerned with anything that takes place before his trial begins.

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[6] The state has filed a comprehensive brief consisting of one hundred fifty pages containing the following answer to appellant's argument regarding his right to an impartial and unprejudiced grand jury:

"Appellant asserts that the denial of his motion to set aside the indictment constituted error under our statutes and constitution and the constitution of the United States (App. Br. 35).

"Appellant cites . . . [citations omitted]. *Except for citing the well-recognized rule that grand juries should be impartial and unprejudiced* (App. Br. 37), the cases are not otherwise applicable." (Italics mine.)

At page 48 of the state's brief, it is stated:

"It is patent that the indictment herein was endorsed 'a true bill' and signed by the foreman of the grand jury and that it was presented and marked 'filed' (Tr. 1). Thus, under the statute, the only grounds defendant could raise on a motion to set aside the indictment were those enumerated in subsections (3) and (4) of RCW 10.47.070. It is submitted that none of the other grounds enumerated in defendant's motion to set aside and dismiss the indictment were provided for by our statutes.

"The grand jurors were selected, drawn, summoned, impaneled and sworn as prescribed by law. Defendant in his motions and affidavits made no allegation relating to the selection, drawing, summoning, impanelment and swearing of the grand jury *except his assertion that the court took no steps 'to exclude from the grand jury any person or persons who entertained an attitude of bias, prejudice and hostility toward the defendants by reason of knowledge' of purported facts outlined by the defendant in his affidavit 'or by reason of belief or opinion gathered from the widespread circulation of publicity with respect thereto' and 'no steps were taken to instruct or direct the grand jury to ignore or disregard the reports circulated . . . or to disregard any attitude or opinion which they might have formed as a result thereof.'* (St. 2140)."

In my opinion, we should view the circumstances of this case realistically and in a reasonable manner. As I read the record, a consideration of the facts of this case thus viewed can only lead to the conclusion that some, if not all, of the grand jurors had already formed certain unfavorable opinions regarding appellant's alleged conduct.

To do otherwise, would seem to be contrary to all human experience. Yet, at no time were any of the prospective [fol. 2617] jurors asked if they had formed an opinion, and, if so, whether such fact would prevent them from participating fairly in an impartial investigation of the matters later referred to in the court's charge.

Furthermore, no instruction was ever given them as to the legal significance to be attributed to the newspaper statements that appellant had invoked the Fifth Amendment privilege some two hundred fifty times in declining to answer questions before the Senate Committee. Yet, such fact was the subject of much comment in the various news media. As stated in *Grunewald* v. *United States*, 353 U. S. 391, 1 L. Ed. (2d) 931, 77 S. Ct. 963, where the court, in discussing the right to invoke this constitutional privilege, quoted from Griswold, The Fifth Amendment Today:

> "Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege."

The failure of the court to interrogate the jurors for the existence of possible bias and prejudice against the officers of the teamsters' union constituted prejudicial error.

The effect of this error was further magnified by the court's charge to the grand jury. The jurors were not instructed to base their deliberations solely upon the evidence presented to them during the course of their investigation. On the contrary, the court's charge seemed to indicate that the so-called disclosures of the Senate Committee were worthy of their consideration. Instead of instructing the jurors that they must wholly disregard the

"testimony" before the Senate Committee, the court expressly brought it to their attention, and then stated the substance of the committee's conclusions as to appellant's conduct. Indeed, the language used implied that the court felt that the grand jurors must already be aware of these matters because of the widespread publicity accorded the [fol. 2618] Senate hearings.

The court stated that the president of the teamsters' union had publicly stated that the sums received by him from the union were a loan, and that it was the function of the grand jury to investigate this matter and determine the truth in that regard. As stated in *Fuller* v. *State*, 85 Miss. 199, 37 So. 749:

> ". . . every man, whether accused or not, is entitled to the presumption of innocence until legally convicted. This presumption is binding upon the petit jury, and stands as a witness in favor of the defendant when on trial. *It guards him before the grand jury until their investigations have produced proof believed by them which overthrows it. It protects him from the circuit judge in his charge to the grand jury, and forbids that any word from that high station*, so apt, on account of its dignity and importance, to influence by its slightest utterance, *should prejudice the grand jury when it enters upon the consideration of violations of the law.*" (Italics mine.)

The last assignment which it is necessary to notice is No. 28, which relates to the alleged misconduct of the prosecuting officers before the grand jury during the examination of the witness, Fred Verschueren, Jr., who was bookkeeper for the Joint Council of Teamsters No. 28.

The testimony of this witness before the grand jury covers one hundred eight six pages of the record and is too long to paraphrase in this opinion. Suffice it to say that he was subpoenaed and first testified on June 20, 1957, regarding the handling of certain funds. He was excused after completing his testimony on that day.

On July 10, 1957, he voluntarily appeared and asked to correct some errors in his testimony. He said he did so at the suggestion of his own counsel. In his testimony on this occasion he told about having in his custody two en-

velopes containing currency which he was holding for appellant. He was excused temporarily to go back to his office and bring these envelopes to the grand jury room. He did so, and the contents of each envelope was counted. [fol. 2619] There was $3,100 in one envelope and $3,500 in the other. Included in one envelope were two $500 bills.

Mr. Verschueren's recollection was rather vague on some details, and his explanations regarding the change in his testimony since his June 20th appearance irked the three prosecuting officers who took turns cross-examining him.

Each of them threatened the witness in various ways: (1) With prosecution for perjury *four* times (penalty fifteen years in the penitentiary—"there is no reason for you to go to the penitentiary for somebody else"); (2) invited him to take a lie detector test; (3) threatened to send the envelopes to the Federal Bureau of Investigation to find out if the witness were lying about having sealed and unsealed them. Another instance of badgering this witness was when one of the prosecuting officers said to the witness that he (the interrogator) knew that one could not get a $500 bill from a teller's window at a bank except by special request, and that "we are going to assume . . . that is correct." At another point, a prosecutor stated to the witness: ". . . nobody in the room [being the grand jury and four prosecuting officers] believes one word you say."

The affidavit of appellant's counsel states on information and belief that there was such loud talking in the grand jury room that it was audible in the hall outside.

The State Grand Jury Handbook, prepared under the auspices of the Section of Judicial Administration of the American Bar Association (1949), states as follows regarding the interrogation of witnesses before grand juries by prosecuting officers or jurors:

> "All questioning should be impartial and objective, without indicating any viewpoint on the part of the questioner."

The questioning of the witness Verschueren in this case could hardly be described as objective. Neither was [fol. 2620] the viewpoint of the interrogator concealed when he attempted to "testify" as to the only possible way to get a $500 bill at a bank and further stated, in effect,

that no member of the grand jury believed a word the witness said.

In order that there may be no assertion that the above described comments on the conduct of the prosecuting officers are not accurate, the pertinent portions of Mr. Verschueren's examination are set forth in Appendix A below.

The functions of a prosecuting officer with respect to the grand jury are limited to the giving of legal advice (upon request) and the examination of witnesses. Our statute and the decisions from other jurisdictions indicate the scope of these functions and are discussed below.

RCW 10.28.070 provides:

> "The prosecuting attorney shall attend on the grand jury for the purpose of examining witnesses and giving them such advice as they may ask."

I do not think that the phrase "examining of witnesses" includes threats, arguments, and comments upon the evidence such as were made in this case. In *United States* v. *Wells*, 163 Fed. 313, the court, in speaking about the duties of the prosecutor with respect to the grand jury, stated:

> ". . . the provision that the prosecuting attorney may at all times appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable by them, was meant to confine him to those traditional duties of giving advice concerning procedure and the like, to the examination of witnesses, as expressly provided, and not to the expression of opinions or the making of arguments. . . ."

Nor is it proper for the prosecutor to state facts which have no relevancy to the guilt or innocence of the person under inquiry (*Attorney General* v. *Pelletier*, 240 Mass. 264, 134 N. E. 407 (1922)); or to pass on the credibility of witnesses (*People* v. *Benin*, 61 N.Y.S. (2d) 692, 186 Misc. [fo 2621] 548 (1946); or in any way influence or direct the grand jury in its findings. *Williams* v. *State*, 188 Ind. 283, 23 N. E. 209 (1919).

The responsibility of the prosecutor in the trial of a criminal matter is discussed in *State* v. *Case*, 49 Wm. (2d)

66, 298 P. (2d) 500 (1956), where we quoted from *People* v. *Fielding*, 158 N. Y. 542, 547, 53 N. E. 497 (1899) these words:

> "'Language which might be permitted to counsel in summing up a civil action cannot with propriety be used by a public prosecutor, who is a *quasi*-judicial officer, representing the People of the state, and presumed to act impartially in the interest only of justice. If he lays aside the impartiality that should characterize his official action to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice seeks to procure a conviction at all hazards, he ceases to properly represent the public interest, which demands no victim, and asks no conviction through the aid of passion, sympathy or resentment.'"

See, also, *State* v. *Reeder*, 46 Wn. (2d) 888, 285 P. (2d) 884 (1955), and cases cited therein.

Thus, if it is the duty of the prosecutor to conduct himself as a *quasi*-judicial officer in a contested criminal trial in the presence of a judge, how much more essential it is that he do so in a secret and uncontested grand jury proceeding before seventeen laymen without the presence of a judge.

The conduct of the prosecuting officers in this case can hardly be characterized as *quasi*-judicial. Rather it is best described in the following quotation from *United States* v. *Wells, supra*, which involved a grand jury proceeding:

> ". . . a commendable zeal, which gathered force as it progressed, finally expanded into an exaggerated partisanship wholly inconsistent with the quasi-judicial duties of a public prosecutor, and entirely unnecessary in the execution of the powers reposed, . . ."

The only case I have found which even remotely resembles the one at bar, in so far as it pertains to misconduct [fol. 2622] of prosecuting officers before the grand jury, is *Commonwealth* v. *Bane*, 39 Pa. Dist. & Cy. Rep. 664. There the defendants themselves were the witnesses before the grand jury, and the court quashed the indictment because

the investigation was conducted by the Commonwealth's counsel in a prejudicial manner, in that the testimony of the defendants was openly derided and they were denounced as hypocrites and liars and were exhorted to repentance and confession in a highly emotional and dramatic manner, the court stating:

> "While it is the duty of the Commonwealth's counsel, as well as his privilege, to attend upon the grand jury with matters upon which they are to pass, to aid in the examination of witnesses, and to give such general instructions as they may require, any attempt on his part to influence their action or to give effect to the evidence adduced is grossly improper and impertinent:..."

The difference between the misconduct in the *Bane* case, *supra*, and that before us here is one of degree only. The witness Fred Verschueren, Jr., on his second appearance before the grand jury, was giving testimony favorable to appellant. His credibility was for the grand jury to pass upon without any comment from the prosecuting officers. It could well be that his testimony was disbelieved by the grand jury solely as a result of the conduct of the prosecuting officers as shown in Appendix A.

Whether such conduct, in and of itself, would be sufficient to invalidate the indictment or not, it is not necessary to determine. However, it could only serve to further prejudice the grand jury, and, when taken in conjunction with the other errors previously discussed, deprived appellant of the right to an unprejudiced and impartial grand jury as contemplated by the law of this state.

The errors on the part of the court in impaneling and charging the grand jury were no doubt due, in large part, to the infrequent occasions when grand juries have been called in this state. The court itself commented on this fact [fol. 2623] in its charge to the grand jury when it said that most people, even lawyers, are generally unfamiliar with grand jury procedure.[1] However, the fact remains that

[1] During the forty years preceding the calling of this grand jury, there had been only seven grand jury sessions in King county.

appellant, be he guilty or innocent, was entitled to a fair and impartial investigation of his conduct in accordance with the forms of the law before a valid indictment could be found against him. I am of the opinion that this right was denied him. As the supreme court of the United States said, in *United States* v. *Hoffman*, 341 U. S. 479, 95 L. Ed. 1115, 71 S. Ct. 814:

> "The signal increase in such litigation emphasizes the continuing necessity that prosecutors and courts alike be 'alert to repress' any abuses of the investigatory power invoked, bearing in mind that while grand juries 'may proceed, either upon their own knowledge or upon the examination of witnesses, to inquire . . . whether a crime cognizable by the court has been committed,' *Hale* v. *Henkel*, 201 U. S. 43, 65 (1906), yet 'the most valuable function of the grand jury . . . [has been] not only to examine into the commission of crimes, but to stand between the prosecutor and the accused,' *id.* at 59. Enforcement officials taking the initiative in grand-jury proceedings and courts charged with their superintendence should be sensitive to the considerations making for wise exercise of such investigatory power, not only where constitutional issues may be involved but also where the noncoercive assistance of other federal agencies may render it unnecessary to invoke the compulsive process of the grand jury."

Conclusion

My conclusion, based on the record herein and the decisions hereinabove referred to, is that two rules of law are applicable to the instant case:

1. That appellant is entitled to the presumption of innocence at all stages of this proceeding from the impaneling of the grand jury to the close of the trial before the petit jury. This right cannot be denied him because of any proceedings had before the Senate Committee.

[fol. 2624] 2. The selection of an unprejudiced and impartial grand jury to determine whether appellant should be indicted or not is just as much an essential part of the

law of this state as the selection of an unprejudiced and impartial petit jury impaneled to try him and render a verdict of guilty or not guilty of the offense charged in the indictment.

It is no answer here to argue that the state could have elected to proceed against appellant by information. The fact remains that the grand jury procedure was used. Thus, it was mandatory that the state comply with those statutes, which have been in effect in this state (and territory) since 1854, granting appellant the right to an impartial and unprejudiced grand jury.

This court, in *State* v. *Devlin*, 145 Wash. 44, 285 Pac. 826 (1927), defined a fair trial. That definition applies *mutatis mutandis* to a grand jury investigation. In the cited case, we said:

> "The question involved is that of a fair and impartial trial. In *State* v. *Pryor*, 67 Wash. 216, 121 Pac. 56, this court said:
>
> "'A fair trial consists not alone in an observation of the naked forms of law, but in a recognition and a just application of its principles.'
>
> "It is the law of the land, a right vouchsafed by the direct written law of the people of the state. It partakes of the character of fair play which pervades all the activities of the American people, whether in their sports, business, society, religion or the law. In the maintenance of government to the extent it is committed to the courts and lawyers in the administration of the criminal law, it is just as essential that one accused of crime shall have a fair trial as it is that he be tried at all, whether he be guilty or not, has his picture in the rogue's gallery or not. In the *Pryor* case just referred to, it was said that it must be remembered, as stated in *Hurd* v. *People*, 25 Mich. 404, 'that unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained is unjust and dangerous to the whole community.'"

Despite the public indignation created by the widespread publicity resulting from the senate hearings, appellant

was entitled to the same unprejudiced and impartial grand jury investigation as the law of this state guarantees to every citizen whether he be prominent or obscure. For one [fol. 2625] hundred five years, it has been the duty of our courts, as prescribed by both the territorial and state legislatures, to see that a state of mind does not exist in any prospective grand juror which would render him unable to act impartially and without prejudice. In my opinion, this statutory duty was not performed in this case, and hence the grand jury was not impaneled as prescribed by law.

Before concluding this dissent, I wish to briefly notice certain statements contained in the majority opinion. The majority takes the position that the only statutory provision that grand jurors in this state are required to be impartial and unprejudiced is found in RCW 10.28.010 and RCW 10.28.030, and that these provisions apply only to persons already in custody or held to answer for an offense. The majority opinion then states:

> "There was a *reason* for such a challenge by a 'person in custody or held to answer for an offense,' but the appellant was not such a person." (Italics mine.)

It seems to me that the only *reason* the legislature granted to a person in custody or held to answer for an offense the right to be investigated by an impartial and unprejudiced grand jury, is that the grand jury's attention had been focused upon him from the commencement of its investigation. That is precisely the situation of appellant here. There could not be any doubt in the minds of the prospective jurors that this grand jury had been convened to investigate appellant. As mentioned above, not only did the newspapers announce, less than three weeks before the impanelment, that appellant was to be investigated by the grand jury, but, also, the trial court, in its charge, instructed the grand jury that the president of the teamsters' union had publicly stated that the sums received by him from the union (which the Senate Committee stated were stolen) were [fol. 2626] loans which had been repaid, and that this issue presented a question of fact for the grand jury to resolve. I do not understand how it can be said, under the facts shown in this record, that the *reason* entitling a person

in custody or held to answer for an offense to be investigated by an impartial and unprejudiced grand jury, does not apply equally well to appellant. It is axiomatic that all men are equal before the law and are entitled to the same rights *under the same or similar circumstances.*

The majority opinion continues with the following statement:

> "When a modern grand jury starts its investigative process it seems ridiculous to suggest that as each new personality comes under scrutiny the proceedings must stop until it can be determined whether any member of the grand jury is biased or prejudiced against him; and, if a grand juror is so biased and prejudiced, the investigation is at an end."

Our duty is to apply the law to the facts of *this* case, and the above-quoted statement has no application to appellant. He was not some new personality who had come under the scrutiny of the grand jury during the course of its investigation. Rather, the court made it clear, in its charge, that the primary purpose of convening this grand jury was to investigate his activities as an officer of the teamsters' union. Appellant was a person whose conduct the trial court, in its charge, specifically directed the grand jury to investigate.

The majority further states that there is no showing here of bias or prejudice. My answer is that if, in the face of all the publicity regarding the Senate Committee hearings described above, anyone realistically could believe that there was no showing of bias and prejudice against appellant at the time of the impanelment of the grand jury, then it is impossible ever for anyone to make such a showing.

[fol. 2627] But, appellant's complaint is that the grand jurors were never interrogated by the trial court *to determine* if any bias or prejudice existed. In the absence of such interrogation, appellant necessarily must rely on the facts stated as indicating what such an interrogation would have disclosed as to bias or prejudice. Under the evidence here, it would be wholly unrealistic to presume that the grand jury was unbiased and unprejudiced.

The majority concludes its discussion of the grand jury proceedings with the statement that even if there were sufficient irregularities in the present case to warrant quashing the indictment, appellant could not be prejudiced, since there is no constitutional or statutory right to a grand jury in this state.

Whether or not there is a constitutional or statutory right to a grand jury in this state is, in my opinion, totally immaterial. What is controlling here is the fact that the state elected to proceed against appellant by indictment rather than by information. Therefore, having so elected, the state was bound to comply with the statutes relating to grand jury procedure.

The majority opinion relies chiefly on decisions rendered by Federal courts whose grand juries need not be composed of impartial and unprejudiced jurors, because no statute or rule of court prescribes that qualification. Whether the Federal system or that ordained by the legislature of this state is preferable, is not for this court to declare. Any and all branches of government must comply with applicable constitutional and statutory requirements in the performance of their functions. This includes the grand jury. Until the legislature amends or repeals the statutory law, quoted and emphasized above, it must be applied with equal effect to every person whose conduct is under investigation by a grand jury pursuant to the court's charge to it.

[fol. 2628] For the reasons stated herein, it is my opinion that the order of the superior court denying appellant's motion to set aside and dismiss the indictment should be reversed and the cause remanded with directions to grant the motion.

Donworth, J.

I concur

Finley, J.
Rosellini, J.
Hunter, J.

[fol. 2629]

APPENDIX A (to dissenting opinion)

Excerpts from examination of Fred Verschueren, Jr., by prosecuting officers before the grand jury July 10, 1957. (All italicized portions are those referred to in the attached opinion.)

"Q. Mr. Verschueren, I want to warn you at this time that you are under oath and that what you say here, if found to be false, can be perjury and you could be guilty of perjury for testifying falsely under oath. A. Yes sir.

Q. You are under oath. A. Yes sir.

Q. *And the penalty for perjury is fifteen years in the penitentiary, it is a felony.* A. Yes sir.

Q. Now, I want to give you every opportunity to state the truth. . . .

Q. You know that. Do you want to tell us when he [appellant] signed this? You still say he signed this in October of '54 when he gave it to you? Do you want to change your testimony or not? A. I don't care to change my testimony. He must have signed it.

Q. *We want to know the truth.* A. I am telling you the truth, Mr. .....

Q. All right. Mr. ..... asked you about these envelopes. *He told you about the penalty for perjury.* You are the person that is on the stand, you are the person under oath down here, do you understand that? A. Yes sir.

Q. We are concerned with one thing and one thing only, the truth. A. Yes sir.

Q. Now, Mr. Beck gave you this envelope in October, 1954, is that your testimony? A. Either that one or the other one, sir.

Q. This is Mr. Beck's handwriting, is it not? A. Yes.

Q. He handed you this envelope with his handwriting on it at one time and one time only, isn't that true? A. Yes, but it is not necessarily the one he handed me in October of '54.

Q. I thought you testified to Mr. ..... it was the first envelope that had Western Conference on it, the other envelope, other material he gave you at a different time. You

testified the first envelope he gave you had Western Conference and Joint Council on it. A. I believe so.

Q. That is the one he gave you October of '54, isn't that correct? A. Well, you are confusing me now.

Q. I am not trying to confuse you, sir. *I want you to tell the truth.* A. I am telling the truth.

Q. *There is no reason for you to go to the penitentiary for somebody else.* A. I am not even thinking about that, sir.

Q. *Well, I am thinking about that, sir.* A. I am telling you the truth so far as I know it.

Q. Let us know the truth, if you will. This is the envelope you got in October of '54 (indicating). A. I believe that is the one, yes sir.

Q. That is your testimony. A. To the best of my recollection, yes sir....

Q. Why would he send a check down to you when he had several thousand dollars in cash? He testified as much as $10,000 in his safe at his own home. Why would he send a check down to you to cash. *Maybe you can answer that.* A. I couldn't say, sir.

Q. Do you want to hazard an answer? *It isn't because you are lying, is it?* A. No sir. I have cashed, many, many checks for Mr. Beck.

Q. Mr. Beck would send his personal checks down to you to cash? Mr. Beck sat on that stand and testified he didn't write two checks a year. A. I said checks made out to him and he would send them down, endorse them.

Q. Isn't there a bank right next door to your place of business? A. Yes.

Q. But he would send them to you to cash out of some fund in the vault? A. He wouldn't necessarily know I was cashing them out of that fund. Actually I could have cashed them out of the office generally, but there were some circumstances where I couldn't.

Q. Mr. Beck testified this morning all his checks were channeled through the B & B Investment Company. That is his testimony this morning, that he never bothered with financial matters, his wife took care of the home and all her expenses and everything else went through the B & B

and he wrote maybe two checks a year, he wouldn't even [fol. 2630] say that many. Is your testimony consistent with that, Mr. Verschueren. A. No.

Q. *It isn't very consistent, is it?* A. I am only telling you what is the truth.

Q. *You are telling the truth?* A. Yes.

Q. *Are you saying Mr. Beck lied to us this morning?* A. No sir, I wouldn't say so.

Q. One of you must be mistaken then, is that correct? When did you talk to Mr. Beck last about your testimony here on the stand? A. I have never talked to him about my testimony on the stand.

Q. Have you talked to him about this money in the vault in the last few days? A. No sir.

Q. *You came in here cold and didn't know what you were going to testify about, is that it?* A. I had a fair idea.

Q. You haven't talked to Mr. Beck, Sr., in the past several days or several weeks? A. I have talked with him, but not about the money, no sir.

Q. You didn't talk about these envelopes in the safe? A. No sir, only that one time.

Q. It dovetails pretty well with his testimony, doesn't it, fortunately? A. I don't know, sir. . . .

Q. These checks you cashed for Dave Beck, Sr. How much were they? A. Oh, varying amounts. Not any of them very high.

Q. How much? A. Mr. ....., I can't remember all those checks.

Q. You are going to be here a long time remembering. You are just starting. When I get through with you Mr. ..... is going to take over again. *We don't think you are telling the truth so we are going to stay with you for a while.* How much did you cash checks for Dave Beck, Sr. for? . . .

Q. Do you deal in $500 bills? A. No sir, I don't personally.

Q. I have never seen one before. This is amazing. Somebody gives you a $500 bill and you have no recollection of it. You sit there and tell me somebody would give you a $500 bill and you wouldn't remember who gave it to you. Is that your testimony? A. If they gave it to me personally?

Q. If they came in—if it came into your possession by

reason of having cashed a check or something? A. Sir, the amounts are all I count, if I have the proper amount of money.

Q. I realize that. Let's not talk about that. Somebody handed you a $500 bill, didn't they? A. Yes.

Q. Who did, and under what circumstances. A. Well, as I say, the odds are—

Q. Never mind the odds. We are talking about what the facts are. I am not interested in the odds. What are the facts? Who gave you the $500 bill? A. It probably came from the bank, yes.

Q. Probably? A. It could have come over the counter.

Q. Did you go to the bank and get those two $500 bills, or didn't you? Did you or didn't you? A. I don't definitely recall, sir, whether I did or not.

Q. You don't know whether you went to the bank and got a $500 bill or somebody gave it to you. A. Whether it came over the counter, no, I don't, sir.

Q. *You expect these people [the grand jury] to believe you would come into possession of a $500 bill— . . .*

Q. You already said you probably went to the bank and got it. A. With the checks I cashed.

Q. Why would you ask for a $500 bill in the bank? A. I probably didn't ask for a $500 bills, but they may have given me one.

Q. You accepted it? A. Yes.

Q. You couldn't cash a check with a $500 bill, when you got it. A. No sir.

Q. Then— A. There was ample funds generally exclusive of this amount then I probably didn't think it would make any difference if I had $1,000.

Q. Not what you think now, then, what did you think then when they gave you the $500 bill and who gave it to you and what went through your mind. Something went through your mind, mister. What went through your mind when you got the $500 bill and who did you get it from. Tell this jury who you got it from? A. Well, I must have gotten it from the bank, sir, or else it came over the counter in the—

Q. Not what must have been done. What did you do? A. I—

Q. I don't care about probabilities. How and when did [fol. 2631] you get it? A. I definitely do not remember, sir, how I came into possession.

Q. *You want this jury to believe you can get a $500 bill* and don't know the circumstances under which you got it. I am 51 years old and I haven't seen one of them yet. How old are you? A. 36.

Q. How many of these $500 bills have you seen in your life? A. (No response)

Q. Well, how many? A. I am trying to think, sir.

Q. It isn't very many, is it? A. Yes, considerable.

Q. I thought you testified a little while ago you had only seen a few of them. *You just got through testifying under oath you had only seen a few of them. Which time are you telling the truth?* A. Well, sir, you are getting me so confused—

Q. I am confused? A. No, but I am.

Q. *I don't think the jury is confused.* Why should you be confused, *you are supposed to be sitting here telling the truth.* A. Yes.

Q. The truth will never confuse you, never. Where did you get that $500 bill, two of them. Where did you get them? Under what circumstances and from whom and how? A. They may have been originals—

Q. I am not interested in may have been. How did you get them? Tell me when and where? A. I cannot tell you, sir, definitely how I got them.

Q. Two $500 bills and you can't tell how you got them, but you got both by your own testimony in the last three years? A. Yes sir.

Q. But you don't know the circumstances? A. No I don't, no. These may be the original bills, sir, I don't know. I don't know.

Q. I thought you said you went to the bank and got those bills? A. Just a moment, you said how did I come into possession of them. They may have been in the envelope originally.

Q. Are you willing to testify now you never got those bills, they are the originals? A. No, I can't say that, sir.

Q. *Is there anything that you can say definitely as you*

sit here this afternoon? Is there anything you can say definitely? A. Yes sir.

Q. *It will be a pleasant relief when that happens.* . . .

Q. Have you ever received a $500 bill from the bank without making a request for it? They don't keep them in those tills, you know, at all. *You can't get a $500 bill from a teller because they don't keep them there.* Did you know that, sir? Did you know that, first. Answer that question. A. They are there if they have come in that day.

Q. *Did you know they don't keep $500 bills at all behind those windows.* They receive them and take them somewhere else. Did you know that? A. No sir, I did not.

Q. *You know it now.* A. No, I don't.

Q. *I am telling you now. They don't keep them there. You can't get a $500 bill without making a request for it,* or a $1,000 bill, *the most you can get is a $100 bill.* Did you know that? From a teller's window? A. No, I did not know that.

Q. *We are going to assume,* just for the sake of this discussion then, *that is correct because I know it to be correct. That is what I have been told by people who know.* A. Yes sir.

Q. Now, we can get the banker in here and get the same banker you've got out there and I assume he is not an officer of the Western Conference of Teamsters or not a member of your union, is he, the banker out there where you bank? A. Pardon.

Q. The bank you go to—what bank do you go to? A. Sixth & Denny Branch.

Q. Mr. Beck doesn't own that bank, does he? A. Not to my knowledge.

Q. *Well, assume the banker will come in and tell the truth,* can we assume that? A. Yes sir.

Q. *He will tell us they don't keep $500 bills in those windows. They don't give them to Fred Verschueren, Jr. when he brings in checks, they don't give them to anyone under any circumstances unless they ask for them* because when you present checks and you want cash the teller always says, 'How do you want it, sir?' Don't they? They always say that to you every time, don't they? A. They sometimes say, 'Sir, do you care how you have it?' . . .

Q. Not on the payroll, so you wouldn't get $500, you [fol. 2632] wouldn't make that special request at the bank, so how would that $500 that came over the counter ever get into the envelope? Under what theory could that possibly get in the envelope? That wasn't your practice. You see, you told us your practice this afternoon, because you realized we wanted to see the envelopes, that you never went to them, you never took anything out and then you went to the union hall and came back and your memory was refreshed in the fresh air and you told us you cashed checks and paid payrolls at times with this money, but each time you would put a I.O.U. in there and then you would adjust it later. Go to the bank and get the money and put it back in here. Mr. ..... asked you about the $500 bill and you said you could have gotten it from the bank. *We are assuming now, because I know* and I think you are pretty well in agreement, *that you can't get $500 bills unless you ask for them at the bank,* that you couldn't have got it at the bank, so the only possible way you could have received that $500 bill is that it is part of the original money that was put in there *because you couldn't have got it over the counter, because that isn't your procedure.* Nothing you got over the counter could have gone in that envelope. If it could, tell us how. A. Well, I did go through that originally. As I said, I would take monies from the box and— . . .

Q. Mr. Verschueren, with reference to this envelope, Exhibit 77, this is the original envelope given to you by Dave Beck in October or November of 1954. This envelope was sealed when you first got it, this is Exhibit 77? A. Yes sir.

Q. And you didn't open it again until the early part of 1955. A. Sometime in 1955.

Q. Around six months went by before you had occasion to go into it. When you went into it you saw this piece of paper in there. You saw this piece of paper, Exhibit 79 when you opened it with your finger and unsealed it? A. Yes.

Q. Then you read the piece of paper. You did whatever you had to do with the money and you resealed it, is that

right? A. I am not certain that I resealed it right at that time.

Q. But it was resealed when the money was put back in. You always kept these envelopes sealed? A. Not always.

Q. You resealed it at that time, after you put the money back, after the first transaction, the first part of '55? A. I won't definitely say I did, no.

Q. When did you reseal it after the first transaction, the first time you opened it? A. I couldn't tell you as to dates, sir.

Q. Approximately when? A few months after? A. I couldn't even approximate.

Q. A year or two years after. Did you leave it open or what? You told Mr. ..... this afternoon that you resealed it right after you opened it. This time you say you didn't. *Why do you hesitate?* A. Well, because I—when you open an envelope innumerable times how do you know which time you sealed it and didn't?

Q. You told Mr. ..... you opened the envelope and resealed it. He questioned you at length about opening it with your finger and you would reseal it and then I think he went further and asked you whether or not you used any glue on it *and you said no*, and still when we have the envelope in this condition, *it is stuck very well*—and you are getting your two $500 bills back now, don't miss that part on the record. Do I understand you told Mr. ..... you resealed this envelope each time that you opened it? A. Well—

Q. Now, you didn't, is that right? A. No, I didn't every time. Did I say I resealed it every time?

Q. I don't think you said every time, you said you resealed it the times you opened it and put the money back and resealed it and Mr. ..... was very, very interested, he asked you what kind of glue did you use glue and you said no you didn't. A. I didn't.

Q. This must be excellent glue on the Western Conference of Teamsters envelopes because the thing is perfectly sealed now. *Understand we can send the envelope* [fol. 2633] *to the F.B.I. and determine from them whether or not it has been resealed numerous times,* or innumer-

able times as you said. You were in there innumerable times. *You understand that, don't you?* A. Yes.

Q. So if you decide all of a sudden here you are going to tell us the truth—*and nobody in the room believes one word you say*—you are telling us now that everything you have testified to here today is the truth? A. Yes sir.

Q. You have nothing to hide? A. No sir.

Q. And you are perfectly willing to undergo any sort of examination to determine if you are telling the truth, is that correct? A. Yes sir.

Q. There is nothing at all that is going to stop you from proving what you said? A. No sir.

Q. *If I tell you now that I have arranged to give you a lie detector test, will you take it?* A. I would have to consult my attorney.

Q. *Yes, that is what I thought, because you are not telling the truth,* are you? *If you were telling the truth you would have no qualms about taking a lie detector test* because a lie detector will not work on a truthful person. It is an exceptionally fine machine, you can't fool it and you are absolutely a perfect subject because you are young and you have your wits about you *and you would fail miserably unless you are telling the truth. Will you take the test?* A. I have heard differently about the lie detector.

Q. Will you take the test? A. No, I will not.

Q. You will not. You don't have to consult your attorney do you? *You don't want to take any test, do you?* A. I will consult him first.

Q. But you won't take any test, will you? Will you, now? A. I will consult him first.

Q. *Yes, that is what I thought. . . .*"

[fol. 2634] No. 34636

HUNTER, J. (dissenting)—I dissent. In the instant case, it was not determined that the members of the grand jury were free from bias and prejudice. This is particularly significant in view of the atmosphere that existed toward the appellant in King county at the time the grand jury was impaneled.

One of the most basic concepts of a judicial proceeding is impartiality. This concept was announced as essential to a grand jury proceeding by both the legislature and the supreme court of this state, in the statutes and decisions cited in Judge Donworth's dissent. Under the rule adopted by the majority, a grand jury may be composed of members who are biased and prejudiced. This rule constitutes such grave error that its application will literally shake the foundation of the judicial system of this state.

The grand jury proceedings should be vacated and set aside.

HUNTER, J.

897.

No. 34636

In the Supreme Court of the State of Washington

STATE OF WASHINGTON, Respondent, vs. DAVID D. BECK, also known as DAVE BECK, Appellant.	No. 34636

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

HONORABLE CHESTER B. REVELLE, *Judge*

PETITION FOR REARGUMENT; PETITION FOR HEARING AND BRIEF IN SUPPORT THEREOF

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2635

In the Supreme Court
of the State of Washington

STATE OF WASHINGTON,
Respondent,
vs.
DAVID D. BECK, also known as DAVE BECK,
Appellant.

No. 34636

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

HONORABLE GEORGE H. REVELLE, *Judge*

PETITION FOR REARGUMENT, PETITION FOR HEARING AND BRIEF IN SUPPORT THEREOF

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I
PETITION

Comes now the Appellant, through his attorneys and respectfully petitions this Court for a Reargument and for Rehearing on the grounds stated herein, reserving and reurging all grounds heretofore stated.

CHARLES S. BURDELL
R. V. WELTS
JOHN J. KEOUGH
Attorneys for Appellant

II

INTRODUCTION

Commencing in March of 1957 and continuing until this very moment, Dave Beck has been and is a man who desperately needs the protection of the judiciary—at this point the appellate level of the judiciary.

In May of 1957 Beck, the appellant herein, was the principal subject of investigation (or, more accurately, the target of attack) of a United States Senate Committee, the United States Internal Revenue Service, and a grand jury in King County, Washington. It is fair to state that at that time he was the most vilified man in the United States—and probably one of the most vilified men in the history of the United States. The hostility toward Beck was intensified by the mass media of news circulation, particularly television, and the willingness and apparent desire of the McClellan Committee to employ these media to suit their purposes; and the

clamor of the public against a national figure found or claimed to have been engaged in some form of misconduct provided a ready market for the communication, by all news media, of the proceedings of the committee. The affirmative accomplishments of the committee were two-fold: (1) a somewhat minor amendment to the federal Labor-Management Relations Act, and (2) the retirement of Dave Beck as president of the International Brotherhood of Teamsters (and his replacement by James R. Hoffa). To achieve these goals, the committee found it expedient or desirable to repeatedly expose Beck to prolonged interrogation concerning matters which the committee knew that he would not and could not answer. The committee knew and welcomed the fact that it had a vast audience, and its attorney and members (some of them being attorneys themselves) knew or ought to have known that their audience, not being composed of

lawyers, would too readily assume that Beck was guilty of something merely because he found it necessary to assert his constituional right. See *Grunewald v. United States*, 353 U. S. 391, 421, 1 L. Ed. (2d) 931, 952, 77 S. Ct. 963.

The committee also knew that its proper function was good faith investigation and not deliberate exposure of claimed misconduct. See *Watkins v. United States*, 354 U. S. 178, 1 L. Ed. (2d) 1273, 77 S. Ct. 1173. Nevertheless, the committee, in the course of the intensified hearings, actually asserted that Beck's claim of privilege amounted to a declaration of guilt (Report of Hearings, Part 5, p. 1537, 1548). One of the statements (by Senator McCarthy) was as follows (p. 1537):

> "You know that if you are innocent of any wrongdoing, then you could answer very simply 'yes' or 'no.' It is only if you are guilty of wrongdoing that you might incriminate yourself? You realize that, do you not?"

Subsequently, in these hearings and on the

basis of testimony and documents which would not have been admissible in court and which were not subject to cross-examination, committee members publicly asserted that Beck had committed various offenses. The committee members and their attorney were not content with making such assertions in the course of the committee proceedings. They wrote articles making such accusations and assertions in national magazines and in public speeches throughout the country. Even today, there is on the newsstands the March issue of the *Reader's Digest* containing an article by Robert Kennedy (the committee counsel and the brother of an avowed candidate for the presidency of the United States) in which Beck is accused, expressly and by implication, of various offenses and acts of misconduct. The article contains many, many inaccuracies.

In the course of these committee hearings neither Beck nor his friends or attorneys had

any forum by means of which to answer the charges made by the committee and by its members. And by the time Beck was brought to trial in the case at bar, it was the sincere and firm belief of his attorneys that public opinion against Beck had been inflamed to such a degree that he, standing alone, could not possibly overcome the prejudice and hostility which the hearings of the McClellan Committee had conceived and carefully nurtured. We do not hesitate to assert, with no disrespect to any judge or judges who may express disagreement, that this opinion was and is shared by an overwhelming percentage of the attorneys in the Seattle area as well as by the general public.

It has been said that in the review of procedural due process, appellate courts are frequently influenced by their view of the guilt or innocence of the defendant. Such conduct of course violates the integrity of the judiciary. (See *Chessman v. Teets*, 354 U. S. 156,

1 L. Ed. (2d) 1253, 77 S. Ct. 1172.) An appellate court which follows this procedure would be of no assistance to a man in Beck's position. A determination of guilt *before* a fair and honest determination of serious challenges of due process is putting the cart before the horse. But aside from this, in the case at bar, purely from a factual standpoint, it must be apparent from the statement of facts that there is more to the case than meets the eye.

It has been said that even judges must guard against the possibility of subconscious prejudice, particularly when a decision must be made against a background of intense propaganda. An appellate court which is not alert to this danger would afford no protection to the rights of a man in Beck's position.

It has been said that some courts are courageous and that some are not. Only a courageous court, objectively devoted to the high-

est ideals of the judiciary, whatever the result in an individual case, can provide any protection to Dave Beck in view of the events of the past three years.

In making these points, we intend no disrespect, no discourtesy, and no implication that any members of this Court will not observe the obligations and tenets of the judiciary; but judges are only men, and the mental processes of men, if unguarded, are subject to motivations of which the individual is unaware. Every lawyer, if he is to serve the profession and his oath in the tradition of the Bar, must constantly be reminded of this fact. We assume that no judge and no court will be offended by a similar reminder, for it is only by the exercise of the highest mental discipline that any member of our profession, whether judge or lawyer, can properly determine the merits of a case as fraught with political and emotional implications as the present one.

III

UNDER THE CONSTITUTION AND STATUS OF THE STATE OF WASHINGTON REARGUMENT MUST BE GRANTED.

A. The Applicable Constitutional and Statutory Provisions

Article I, §22 of the Washington State Constitution provides:

> "In criminal prosecutions, the accused shall have . . . the right to appeal in all cases; . . ."

This right is re-affirmed in Amendment 10 of the Washington State Constitution.

Article IV §2 of the Washington State Constitution provides:

> "The Supreme Court shall consist of five judges, a *majority of whom shall be necessary to form a quorum and pronounce a decision* . . . In the determination of causes all decisions of the court shall be given in writing *and the grounds of the decision shall be stated.* The legislature may increase the number of judges of the Supreme Court from time to time and may provide for separate departments of said court." (Italics supplied).

R. C. W. 2.04.070 provides:

"The supreme court, from and after February 26, 1909, shall consist of nine judges."

Rule 6 of Rules Peculiar to the Business of the Supreme Court provides:

"The court is divided into two departments, denominated respectively, Department One and Department Two. . . .

• • • •

"The presence of four judges shall be necessary to transact any business in either of the departments, except such as may be done at chambers, but one or more of the judges may from time to time adjourn to the same effect as if all were present, and *a concurrence of four judges shall be necessary to pronounce a decision in each department.*" (Italics supplied.)

R. C. W. 2.04.170 provides as follows:

"The chief justice, or any four judges, may convene the court en banc at any time, and the chief justice shall be the presiding judge of the court when so convened. *The presence of five judges shall be necessary to transact any business, and a concurrence of five judges present at the argument shall be neces-*

sary to pronounce a decision in the court en banc: Provided that if five of the judges so present do not concur in a decision, then reargument shall be ordered and all judges qualified to sit in the cause shall hear the argument, but to render a decision a concurrence of five judges shall be necessary; and every decision of the court en banc shall be final except in cases in which no previous decision has been rendered in one of the departments, and in such cases the decision of the court en banc shall become final thirty days after its filing, unless during such period a petition for rehearing be filed. The filing of such petition within such a period shall have the effect of suspending the decision until disposed of by the concurrence of five judges: . . . ." (Italic supplied.)

Rule 15 of the Rules Peculiar to the Business of the Supreme Court provides:

"The Chief Justice, or any four judges, may convene court *en banc* at any time, and the Chief Justice shall be the presiding judge of the court when so convened. The presence of five judges shall be necessary to transact any business, and *a concurrence of five judges present at the argument shall be necessary to pronounce a decision of the court en*

banc: *Provided, that if five of the judges so present do not concur in a decision, then reargument shall be ordered and all the judges qualified to sit in the cause shall hear the argument, but to render a decision a concurrence of five judges shall be necessary;* and every decision of the court whether rendered *en banc* or by a department shall be final thirty days after its filing, unless during such period a petition for rehearing be filed. The filing of such petition within such period shall have the effect of suspending the decision until disposed of by the concurrence of five judges: . . . ." (Italics supplied.)

Rule 16 of the Rules on Appeal of this Court provides as follows:

"Upon an appeal from a judgment or order, or from two or more orders with or without the judgment, the *Supreme Court will affirm, reverse or modify any such judgment* or order appealed from, as to any or all of the parties, and will direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had; and if the appeal is from a part of a judgment or order, will affirm, reverse or modify as to the part appealed from. The decision of the court shall be given in writing and in no

cause shall be deemed decided until the decision in writing is filed by the clerk ..." (Italics supplied.)

Rule 63 of the Rules on Appeal of this Court provides as follows:

> "The Supreme court will hear and determine all causes removed thereto in the manner hereinbefore provided, upon the merits thereof, disregarding technicalities, and will upon the hearing consider as made all amendments which could have been made."

B. Present Status of the Case In the Supreme Court

This case was heard by eight judges of this Court, the ninth judge having disqualified himself. Judge Hill has filed an opinion, concurred in by three other judges, purporting to affirm the judgment of the trial court. In addition, Judge Donworth has filed an opinion, concurred in by three additional judges, in which it is stated that the order of the Superior Court which denied appellant's motion to dismiss the indictment

should be reversed and the cause remanded with directions to the Superior Court to grant such motion. Judge Hunter, who concurred in the opinion written by Judge Donworth, wrote a separate opinion in which he took the view that the grand jury proceedings should be vacated and set aside. Thus, the opinion of the eight judges participating in the case on appeal is equally divided on the issue of the validity of the indictment.

In addition to the aforesaid opinions, a per curiam statement has been filed in which it is recited that the eight judges "were equally divided in their decision . . ." and that there is "no majority for affirmance or reversal . . ."[1]

The per curiam statement expresses no

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[1] The general rule is that a per curiam decision is a decision in which the judges are in agreement and it does not require a complete or detailed statement of the reasons for the decision. See 21 CJS §317, p. 400. There is a distinct difference between an "opinion," which is merely a statement of reasons, and a "decision," which is a judgment or conclusion and which constitutes the instrument through which a court acts. See State ex rel. Lynch v. Pettijohn, 34 Wn. 2d 437,442.

grounds for decision, as required by Article II §2 of the Washington State Constitution, nor does it constitute a determination of the cause upon the merits, as required by Rule 63 of the Rules on Appeal.

There is nothing to indicate that the four judges who were of the opinion that the indictment should be dismissed "decided", despite that opinion and in contradiction thereto, that the judgment in the trial court should be affirmed. Indeed, in view of the emphatic language contained in the opinion of Judge Donworth and that of Judge Hunter, it seems clear that the four judges who concurred in the views expressed in those opinions would hardly have concurred in any decision so directly in conflict therewith.

C. In the Present Status of the Case, Reargument Is Required By Statute and Rule

For the reasons stated above the per curiam statement does not constitute a decision under the Constitution and the laws of the

State of Washington. It is, therefore, invalid and must be set aside, and reargument must be granted under the provision of RCW 2.04.-170. A judgment of a reviewing court is void unless the requisite number of judges concur. See 3 Am. Jur. §1159, p. 670.

There are, of course, cases in the State of Washington as well as cases in other jurisdictions in which the judgment of a trial court has been affirmed by an equally divided court. It has been said that a trial court judgment is affirmed "by operation of law" when the appellate court is equally divided. These decisions do not affect appellant's right to reargument as provided in RCW 2.04.170. In some of these cases neither the reported decision nor the file indicates whether the decision was rendered *before* or *after* reargument and in the cases where there was no reargument, it does not appear that the duty to order a reargument was brought to the attention of the court, either

by petition or otherwise. See, e.g., *Edwards v. Carroll,* 163 Wash. 704; *Clise v. Carroll,* 163 Wash. 704; *State ex rel. Taxpayers v. Remann,* 29 Wn. 2d 843.

On the other hand where the right to reargument has been brought to the attention of the court by petition, the court has granted reargument on the theory that it is required to do so under the provisions of RCW 2.04.170. Thus, in *State ex rel. McAulay v. Reeves,* 196 Wash. 1, the court, after reargument, stated at page 10:

> "Upon the filing of the foregoing opinions, the respective parties to the cause jointly petitioned that the matter be set down for reargument. The petition was granted, as required by the provisions of Rem. Rev. Stat. §11 [P. C. § 8656], and a reargument was had on August 9th. As a result of the more mature consideration of the matter thus afforded, five members of the court (Judges Main and Blake dissenting) have reached the conclusion that *State ex rel. Chealander v. Carroll,* 57 Wash. 202, 106 Pac. 748, should be overruled. With that modifica-

tion, the first of the foregoing opinions is adopted as the opinion of the court."

Reargument, when the court is divided in opinion, has been ordered in certain cases even in the absence of a petition. See *State v. Alfred,* 145 Wash. 696 (No. 20563); *Peterson v. Tacoma,* 139 Wash. 313 (No. 19294); and in *Serra v. National Bank of Commerce,* 27 Wn. 2d 277, the court, on its own motion, ordered two rehearings *en banc* after a departmental hearing. After both of the *en banc* hearings, the opinions of the judges remained equally divided.

In any case in which there is a divided court, it is manifest that the litigants, and indeed the court, should be entitled to reargument. Frequently counsel for the litigants can be of assistance to the court with respect to questions or points which have been raised in opinions of the court. This added assistance may result in a change or modification of the opinion of one or more

of the judges. This occurred in *State ex rel. McAuley v. Reeves, supra.* Similarly, it is possible that where several questions are raised on appeal, and where the court has spent a considerable period of time and effort upon one of these points, a reargument upon one or more of the other points may be of assistance.

In short, a divided court demonstrates that there is a problem or problems of considerable difficulty before the court; and in a criminal case, an opportunity for reargument is little to ask when the alternative is imprisonment or the expense of an appeal to a higher court. And while it is true that the time and effort in considering a reargument may be a burden upon the court, there is always a degree of possibility that the reargument will result in a decision by the majority; and should this be the result, the effort which has been expanded by the litigants and by the court is a small price to pay for the reward

of added confidence in the judicial system which will ensue. We submit, therefore, that the court owes itself, as well as the litigants, an opportunity for reargument and resubmission of the case.

In any event, in this State, where reargument is requested, the Court is required by statute and by its own rule to grant the request. We have found no cases in which a petition for reargument under such circumstances has been denied.

IV

A JUDGMENT OF CONVICTION IN A CRIMINAL CASE IN THE STATE OF WASHINGTON CANNOT BE AFFIRMED BY A DIVIDED COURT

There are, of course, many decisions throughout the country, as well as several in the State of Washington, which hold that the judgment of a trial court is affirmed if the opinions of the appellate judges are equally divided. Some of these decisions are criminal cases, including the case of *State v. Alfred,*

145 Wash. 696. Needless to say, it offends the dignity of the judiciary system and public policy to imprison any person in a situation where the validity of the conviction is so strongly in doubt that the appellate court is unable to reach a majority decision.

At common law there was no right of appeal and in cases where the appellate court was divided, the appeal was frequently *dismissed,* as distinguished from the judgment being affirmed. *All-Rite Contracting Co. v. Omey,* 27 Wn. (2d) 898; *Ellis v. Banyard,* 104 L. T. 460 (1911); *Metropolitan Water Board v. Johnson and Co.,* 107 L. T. 711 (1913); *Bolan v. Allgood,* 108 L. T. 461 (1913).

The dismissal of an appeal because the appellate court is equally divided, where there is no fundamental right of appeal, is a result which can be accepted with some logic. This is not true, however, where there is a constitutional or statutory right of appeal. The right of appeal most certainly must carry

with it the right to a decision in accordance with the applicable statutes and rules, for certainly the right of appeal without the right to a decision is no right at all. In such case any act by the appellate court, whether it be affirmance or reversal, must be based upon the statutory provisions relating to appeals. Otherwise the act of the appellate court would violate the constitutional guarantees of equal protection and due process.[1]

An affirmance by an appellate court of a lower court judgment must be based either upon some statutory procedure or upon some rule of law consistent with the constitutional guarantees of equal protection. It cannot be based upon presumptions.

The practice of affirming a lower court judgment where the appellate court is divided probably flows from the fact that at common

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[1] The constitutional guarantees provided for in the Fourteenth Amendment apply to all acts of a state, including the acts performed by courts. See Carter v. Texas, 177 U. S. 442, 20 S. Ct. 687, 44 L.Ed. 839.

law there was no right of appeal and, accordingly, appeals were dismissed in the event the appellate court was divided. The practical effect of a dismissal of an appeal in such a situation was to leave undisturbed the judgment of the lower court. This was regarded as an affirmance "by operation of law." 3 Am. Jur. Sec. 1160 p. 671. But where constitutions and statutes provide for rights and methods of appeal, a different situation exists. In such case, the appellate court cannot resort to the "operation of law" theory because the question immedidately arises: What law exists which requires or permits an affirmance where the appellate court is divided? And, in criminal cases, would it not be more consistent with the guarantees of the Constitution to require the appellate court, if it is equally divided, to reverse a judgment of conviction?

Thus, in those states where a right of appeal exists in a criminal case, that right must

be exercised in a manner consistent with the methods of appeal which are provided and in accordance with the guarantees of equal protection and due process of the Fourteenth Amendment to the Constitution of the United States. See *Frank v. Magnum*, 237 U. S. 309, 59 L. Ed. 969, 35 S. Ct. 582; *Doud v. United States*, 240 U. S. 206, 95 L. Ed. 215, 71 S. Ct. 262; *Kyle v. Wiley*, 78 A. (2d) 769, (1951, Municipal Court of Appeals D. C.).

In many states there are statutory enactments which establish the procedure to be followed in the event the appellate court is equally divided. Most of these statutes provide that in such case, the judgment of the lower court shall be affirmed.[1] A statute of this nature is constitutional because the right of appeal is not essential to due process and,

[1] Illustrations are: Vol. 1, p. 375, Colorado Stat. Ann.; §24-4015, Georgia Code; Burns Indiana Statutes Annotated, § 2-3232; § 21.160, Kentucky Revised Statutes; § 691.26 Compiled Laws of Michigan. In Connecticut, the statute provides that a majority of the appellate judges is necessary to reverse a lower court judgment and if the appellate judges are equally divided, the cause shall be determined by the vote of the chief judge: see § 7622, G. S. of Conn. (1949).

accordingly, a state may enact statutes imposing limitations or conditions upon that right. See *Lott v. Pittman,* 343 U. S. 588, 61 L.Ed. 915, 37 S. Ct. 473. On the other hand, in states where there is a right of appeal by constitution, the statutes which implement such right must be followed; and failure of the statute to provide for a method in which the right of appeal can be fully and effectively exercised does not justify a denial of that right.

In the State of Washington, there is no provision for dismissing an appeal in the event the Supreme Court is divided, and to do so would impinge upon the constitutional right to appeal and the right of decision in accordance with statutory procedure. Nor is there in Washington any statute or rule which provides that in the event the appellate court is divided, the judgment of the lower court shall be affirmed. There is, in short, no statutory law which permits this Court in a crim-

inal case to affirm a conviction "by operation by law."

Likewise, this Court is not permitted to indulge in any presumption of law to the effect that the rulings of the trial court were correct. No statute permits this, and even if there were such a statute, it would doubtless be held unconstitutional on the ground that it violates the constitutional right of appeal.

This was demonstrated in the case of *Eskridge v. Washington State Board,* 357 U. S. 214, 2 L. Ed. (2d) 1269, 78 S. Ct. 1061. That case involved an application for *habeas corpus* filed in 1956, the petitioner having been convicted of murder and imprisoned in 1935. The petitioner alleged that error had occurred in the course of his trial and contended that the failure of the State to provide him with a free transcript of the trial proceedings violated the Fourteenth Amendment to the United States Constitution. A Washington statute (Rem. Rev. Stat. 42-5,

RCW 2.32.240) provided that if a defendant in a criminal case presented satisfactory proof of inability to pay for a transcript, "the judge presiding, if in his opinion justice will thereby be promoted, may order said transcript to be made . . ." at the expense of the county treasury. The trial court considered this statute and made a finding to the effect that justice would not be promoted by providing a free transcript because, "the defendant has been accorded a fair and impartial trial, and in the Court's opinion no grave or prejudicial errors occurred therein." This Court denied the petition without opinion, and the Supreme Court of the United States granted certiorari. The latter court reversed the decision of this Court on the ground that it violated the Fourteenth Amendment and the Supreme Court declared that the "conclusion of the trial judge that there was no reversible error in the trial cannot be an adequate substitute for the right to full ap-

pellate review available to all defendants in Washington who can afford the expense of a transcript." (357 U. S. 214, 216). We submit that if Washington cannot enact a statute which conditions the right of appeal by establishing a presumption of correctness on the part of the trial court, then such presumption certainly cannot exist in the absence of statute; and thus, as here, where the Supreme Court is divided, there exists no law by presumption which warrants an affirmance of conviction "by operation of law."

Moreover, in the case at bar the elleged errors (and particularly the questions relating to the empanelment and proceedings of the grand jury) involve pure questions of law. It may be true that there exists some presumption concerning the correctness of the findings of fact of a jury or trial court and that upon review of such findings, an appellant, even in a criminal case, may have the burden of persuading a majority of

the judges that the findings were incorrect.

But we need not argue this point because there is no presumption of the correctness of the rulings of law of a trial court. *Ellerbeck v. Haws,* (Utah 1958), 265 P. (2d) 404; *Kubby v. Hammond,* (Arizona 1948), 198 P. (2d) 134; *Sapp v. Barenfeld* (Cal. 1949), 212 P. (2d) 233; *Loucks v. Pierce* (Ill. 1950). 93 N.E. (2d) 372. Indeed, where an appellate court is divided equally on a point of law, it is sheer nonsense to require an appellant in a criminal case to overcome a presumption that the trial court's ruling on points of law were correct. This is particularly true where, as here, the purported affirmance clearly overrules prior decisions of ~~this Court~~ the appellate court. In *State ex. rel. Murphy v. Superior Court,* 82 Wash. 285, the relator moved to set aside an indictment on the ground that the grand jury was not empaneled as provided by law. 78 names had been drawn from the jury lists. Approximately 38 of these claimed exemp-

tion under the applicable statutes. From the remaining 40, the presiding judge selected 17 to serve as grand jurors. Some of these were found to be disqualified or were excused for other reasons and the judge thereupon selected a sufficient number of those remaining to constitute a grand jury composed of 17 persons. There remained approximately 18 veniremen, and these were excused without examination or the chance of being selected as grand jurors. This Court held that the indictment should be dismissed because (p. 286):

> "That it was the policy of the legislature to preserve the right to have an unbiased and unprejudiced jury and grand jury, and that no suspicion should attach to the manner of its selection in all cases, cannot be questioned. An essential element in selecting jurors is the element of chance. The English speaking people have found no better way and have made it the supreme test of sufficiency. Selection by chance has been indorsed by this court, speaking in harmony with an unbroken current of authority."

The Court further declared that the fact

that no prejudice was demonstrated, and that a fair jury had in fact been selected, was immaterial and would not cure the error in the method of selection. Similarly, in *State v. Guthrie,* 185 Wash. 464, 475, this Court expressly stated that the policy of the law charges the court with the responsibility of insuring that qualified and *impartial* grand jurors are secured.

In purporting to affirm the judgment of the trial court in the case at bar, the opinion of Judge Hill (155 Wash. Dec. 570-571) declares that bias or prejudice on the part of one or more of the grand jurors is not a ground for setting aside an indictment, and the opinion further indicates (p. 571) that the burden is upon the defendant to make a showing of bias and prejudice. This opinion is in direct contradiction to the holding in *State ex. rel. Murphy v. Superior Court, supra,* and its overrules both the result and the language of that case. Surely, this cannot be

done by a divided court. There is no statute or legal principle in this State which permits a decision of this Court on a point of law to be overruled "by operation of law," or by presumption, or by a superior court, or in any manner other than by decision of the requisite number of judges of the Supreme Court.

Similarly, the case law of this State does not provide a constitutional basis for affirmance of a conviction by a divided court. In this State, the practice of affirming the judgment of the lower court is not inflexible and the course to be followed in such a situation is wholly within the discretion of the Supreme Court. *Serra v. National Bank of Commerce*, 27 Wn. (2d) 277. The practice is purely one of expediency and the action of the court depends upon such factors as whether there might be a change in the personnel of the court, or whether, for some reason, immediate disposition of the cause is necessary. See *Serra v. National Bank of Commerce*, su-

pra; *State ex. rel. Taxpayers v. Remann*, 29 Wn. (2d) 843. Where, in a criminal case, there is a constitutional right of appeal, we submit that that right is not satisfied by the affirmance of cases because of expediency or on the possibility of a change in the personnel of the court. Affirmance of a conviction based upon such factors most certainly denies to any appellant protection equal to that which is afforded to one whose conviction is affirmed by a majority decision, in accordance with the Constitution and statutes of the State.

Moreover, Rule 63 of the Rules on Appeal requires that this Court make its determination of the issues which are presented to it "upon the merits." The purported decision of a divided court surely cannot constitute a determination of the cause upon the merits of either procedural or substantive law.

In order to affirm the conviction in this case, or in any criminal case, it would be

necessary, of course, to remand the cause to the superior court. But even this act constitutes a judicial "decision" because it is "the instrument through which the court acts." *State ex. rel. Lynch v. Pettijohn*, 34 Wn. (2d) 437, 442. Under our Constitution and statutes, such a decision must be made by a majority of the court. Any number of judges comprising less than a majority have no power to make or render such a decision.

We submit that the Constitution and statutes of the State of Washington do not permit affirmance of a conviction by an equally divided court and that any attempt on the part of this Court to utilize such a vehicle of affirmance constitutes a denial of the equal protection and due process clauses of the Fourteenth Amendment.

Under moral as well as legal principles a human being should stand free under his constitutional right of appeal and presumption of innocence until it can be stated affirma-

tively, by a method of decision provided by statute and with a statement of the reasons for such decision, that his conviction was legal. He should not be sentenced to imprisonment by indecision. Due process of law is an expanding concept, based upon the policy of a community with respect to judicial regularity and fairness. Where a community has determined that its citizens are entitled to appeal from a conviction in a criminal case, imprisonment by indecision destroys that right and violates the concept of equal protection and due process which are implicit in this right.

V

THE OPINION OF JUDGE HILL CONCERNING THE IMPANELMENT OF THE GRAND JURY, WHICH IS CONCURRED IN BY THREE OTHER JUDGES, IS ERRONEOUS UNDER THE LAW OF THE STATE OR WASHINGTON AND VIOLATES THE FOURTEENTH AMENDMENT.

In the opinion written by Judge Hill it is stated that the inference to be drawn from

the argument of appellant is that adverse publicity renders a person immune from grand jury investigation (155 Wash. Dec. 568). If appellant's argument suggested this inference, the argument was inept. No such inference is intended and appellant's argument compels no such inference. Defendants in criminal cases, like other members of any community, must accept the fact that current techniques of communication may result in adverse publicity. On the other hand, this does not mean that publicity prevents prosecution. But courts would be blind, indeed, if they did not recognize the dangers inherent in the saturation type of publicity. Hostile and adverse publicity in any case demands that the courts be vigilant and alert to protect the rights of the accused; and in many cases (and particularly in the case at bar) hostile publicity may require special observance by the courts, at all stages of a criminal case, of the rights of the accused. To protect these rights,

adverse publicity may require special precautions in such matters as selection and impanelment of grand juries, conduct of the prosecution, the granting of reasonable continuances, and other appropriate safeguards. But this does not mean that prosecution cannot proceed, subject to the observance of such special precautions as may be appropriate.

In the opinion written by Judge Hill, it is flatly held that bias or prejudice on the part of one or more of the grand jurors is not a ground for dismissal of an indictment. This holding, if adopted by the Court, would be a definite and positive violation of the Fourteenth Amendment to the Constitution of the United States. The case of *Cassell v. Texas*, 339 U. S. 282, 94 L. Ed 839 settles this point once and for all. In that case the defendant was a negro and negroes had been excluded from the grand jury which indicted him. At the outset of its opinion, the

Supreme Court of the United States approached the problem as follows:

> "Review was sought in this case to determine whether there had been a violation by Texas of petitioner's *federal constitutional right to a fair and impartial grand jury.*" (Italics supplied).

The Court held that the right to a fair and impartial grand jury did exist, and that this right had been violated.

Justice Jackson, in a separate opinion, argued (as does Judge Hill in the case at bar) that an indictment was only an accusation and that any bias or prejudice in instituting the accusation would be cured by the various safeguards implicit in a fair trial. *But the opinion of Justice Jackson was a dissent.*

Similarly, in *State v. Pierre* (La. 1938) 180 So. 630, reversed in 306 U. S. 354, the United States Supreme Court rejected the argument that an indictment returned by a grand jury

which might have been prejudiced could be cured by a fair trial.

The case of *Hernandez v. Texas*, 347 U. S. 475, 98 L. Ed. 866, 74 S. Ct. 667 is to the same effect. In that case the court declared (347 U. S. 478):

> "But community prejudices are not static and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact."

On the record in this case, and indeed on the basis of common knowledge, the fact that officers of the Teamsters Union constituted a group which required the protection of the Fourteenth Amendment is a point which is not subject to dispute—and this is particularly true if the name of that officer was Beck. If this group did not need such protection *before* the impanelment of the grand jury, it surely needed it after the charge and instructions which the lower

court gave to the grand jury. Without fear of being accused of any prejudice toward race or color, we submit that Beck is entitled to no less protection under the Fourteenth Amendment than that afforded to a negro or to a Mexican.

The Fourteenth Amendment is not limited to protection of a minority race. In the *Hernandez* case, *supra*, the court declared (347 U. S. 475, 477):

> "Although the court had little occasion to rule on the question directly, it had been recognized since *Strauder v. West Virginia*, 100 U. S. 303, 25 L. Ed. 664, that the exclusion of a class of persons from jury service on grounds other than race or color may also deprive a defendant who is a member of that class of the constitutional guarantee of equal protection of the laws."

In the opinion written by Judge Hill it is suggested that the appellant made no showing of bias or prejudice (155 Wash. Dec. 571). Do we understand that Judge Hill and the judges who concurred in that opinion intend

to dispute the fact that it was common knowledge that there existed a general and intense attitude of bias and prejudice against Beck throughout the Seattle area? We honestly do not believe that these judges intend to deny this fact. But in any event, the point is immaterial. Grand jurors, as in the case of trial jurors, cannot be held to impeach the validity and correctness of their findings if an indictment has been regularly returned. *Commonwealth v. Smart* (Pa. 1951) 84 A. (2d) 782. Moreover, where a constitutional right has been violated, prejudice need not be shown by the defendant. Thus, in *Cassell v. Texas, supra,* it was not necessary for the defendant to demonstrate that the persons who were selected as grand jurors were in fact biased or prejudiced against him. Nor was that burden imposed upon the defendant in *Hernandez v. Texas, supra.* All that the court held to be necessary was a showing that the defendant was a member of a group

toward which there was some degree of bias or discrimination. In *Hernandez v. Texas* there was merely a showing of a few circumstances which warranted the inference that there existed an attitude of discrimination toward Mexicans. In the case at bar, the circumstantial evidence in the record (aside from common knowledge) is overwhelmingly more powerful, both in quality and quantity, than was the evidence in the *Hernandez case.*

In view of the above decisions there can be no doubt that the opinion of Judge Hill on this point is contrary to the provisions of the Fourteenth Amendment.

As pointed out by Judge Donworth, the opinion of Judge Hill is also contrary to the statutes and decisions in the State of Washington. The fact that the laws of the State of Washington require an impartial grand jury has been recognized by the judges of two superior courts since the impanelment of

the grand jury in the case at bar. In August 1958 a grand jury was impaneled in the Superior Court of the State of Washington in and for the County of Grant, by Judge Cy McLean. Judge McLean was careful to interrogate each prospective juror with respect to the question of possible bias or prejudice. The voir dire examination of the prospective grand jurors was similar to that which is usually employed in the examination of petit jurors. Typical excerpts from this impanelment are as follows:

> "Q—Would there be anything in your acquaintanceship with Mr. Schuster that would in any way tend to affect your decisions in this Grand Jury investigation?
>
> A—I don't think so.
>
> Q—In other words, you wouldn't have any hatred or malice or fear or favor or anything of that nature so far as your deliberating would be concerned in connection with this investigation?
>
> A—No. . . ."
>
> * * *
>
> Q—Have you formed any opinion, Mr. Krueger, as to any of the matters that

have appeared in the paper or that you have heard concerning this Grand Jury investigation?

A—To some extent, I have, yes.

Q—Do you feel that your opinion would be such that it would stay with you regardless of what evidence was elicited by the Grand Jury?

A—I would try not to let it interfere. I would say that it wouldn't.

* * *

Q—Seeking the matter as a whole, you of course read and heard things about this pending Grand Jury investigation?

A—Yes.

Q—Do you feel that you would be able to render any final decision as a Grand Jury member unaffected by your previous knowledge or thoughts that you might have concerning this matter?

A—I'm sure that I will not be influenced unless substantial evidence would be presented that I could accept.

Q—And your decision in this matter would depend on what evidence the Grand Jury had before it?

A—That's right.

* * *

Q—And I believe you stated there was nothing in your association that would bother you sitting on this Grand Jury?

A—Yes.

Q—You believe you could be fair and impartial to decide whatever your findings are upon the testimony that is presented, is that correct?

A—That's right, I certainly would.

* * *

Q—Mr. Hardt, you have no doubt read and heard things of this Grand Jury investigation?

A—I have, yes.

Q—As a result of what you have read or heard have you formed an opinion that would stick with you regardless of what is put before the Grand Jury?

A—No, not that I know of.

Q—In other words, there is nothing to prevent your bringing a decision strictly on the evidence that is brought before the Grand Jury?

A—I think so, yes.

Q—Do you know any reason why you couldn't be a fair Grand Juror?

A—No."

The same procedure was followed in the impanelment of the grand jury in Snohomish County, Washington, in December 1959. The grand jury in that case was impaneled for the purpose of investigating the method of law enforcement in the county. Judge Den-

ney interrogated each prospective juror to determine whether the juror was acquainted with any law enforcement officials or any attorneys and questioned each juror with respect to his knowledge of law enforcement practices and procedures and other related subjects; and in interrogating each juror, Judge Denney asked questions such as the following:

> "Q—From what you have heard, and I don't believe you live in a vacuum any more than the rest of us, is there anything you have read or that has been suggested by the court in these proceedings that would suggest to you why you couldn't be fair, impartial and objective in making an examination into law enforcement in this county?
>
> A—No, sir."

The opinion of Judge Hill is not only contrary to the Fourteenth Amendment and other law and current practice in the State of Washington; but it is also contrary to the popular conception of the function of grand jurors. For several months Columbia Broad-

casting System has produced and televised a program entitled "Grand Jury." At the commencement of each program the announcer describes the grand jury as being an institution which is the bulwark of liberty and which protects the inalienable rights of free people and which serves *without prejudice* to maintain the laws of the land. (Note: The writers of this brief have in their possession a certified copy of the impanelment of the grand jury by Judge McLean, and an uncertified copy of the impanelment of the grand jury of Judge Denney. We also have in our possession a copy of the description of the function of grand jurors, as included in the aforesaid television program, which was received from Desilu Productions, Inc., of Los Angeles. We do not know the number of stations in the country which reproduce this program, but Mr. Burdell saw it, and heard the aforesaid description, in New York City

on February 16, 1960. Affidavits concerning these subjects will be filed).

In the opinion of Judge Hill considerable reliance is placed upon a number of decisions of federal district courts. It is doubtful whether these decisions represent the practice generally followed by federal courts throughout the country. In any event, these decisions, if followed, would not be approved by the Supreme Court of the United States, as is declared by the decisions referred to above.

In the opinion written by Judge Hill it is argued that a grand jury need not be impartial because under the law of this State accusations may also be made by Information. We submit that the contention that an accusation made in an illegal manner is proper merely because the same accusation *might* have been made in a legal manner must not be followed. The consequences of this novel theory are troublesome, to say the least. Does

this mean that a prosecutor can use the subpoena power of an illegally constituted grand jury to obtain evidence upon which to base an Information? Supposing a prosecutor believes that there is not just cause upon which to base an accusation: Does this mean that the court can impanel a biased and prejudiced grand jury which will accuse regardless of just cause? Suppose an indictment were to be dismissed because of bias and prejudice of a grand jury, and suppose the statute of limitations had expired during the interim between the return and dismissal of the indictment: Could the prosecutor return an Information despite the expiration of the statute of limitations simply on the ground that he had the power to file an Information at the time the indictment was returned? And to reverse the situation, would any court refuse to dismiss an Information filed by a biased and prejudiced prosecutor simply because the same accusation might properly

have been made by a grand jury? These questions answer themselves and illustrate the problems which would be involved if we were to regard the power and function of a prosecutor and grand jury as co-extensive. The point is that a prosecutor will not necessarily file an Information on the same evidence upon which a grand jury might base an indictment, nor will a grand jury necessarily return an indictment based on the same evidence upon which a prosecutor might file an Information. The prosecutor is a quasi-judicial officer and must be free from bias and prejudice. Similarly, the grand jury is an arm of the court and must observe the same impartiality as the court itself.

In federal courts, an accusation for a misdemeanor may be made by filing an Information or by the return of an indictment. In the case of *Evaporated Milk Association, Inc. v. Roche* (9th Cir. 1942) 130 F. (2d)

843, (reversed on procedural grounds in 319 U. S. 21, 87 L. Ed. 1185) the validity of an indictment was challenged on the ground that the grand jury which returned it had been improperly continued from one term of court to the next term. The case was argued extensively and considered carefully by the Ninth Circuit sitting *en banc*. In the course of the thorough argument and decision it did not occur to anyone that the court could have used Judge Hill's contention and disposed of the matter simply by stating that the validity of the grand jury was immaterial because the district attorney could have returned an Information.

Judge Donworth summarizes all of these points briefly and logically by pointing out that when any procedure is used for the purpose of making an accusation, the procedure must be properly created and carried out.

In considering the question of the legality of the grand jury, brief reference should be

made to the conduct of the prosecutors in the course of the grand jury proceedings. What happens if both the prosecutors *and* the grand jury are biased and prejudiced, or if the grand jury is biased and prejudiced and the prosecutors intensify the prejudice by misconduct in the interrogation of witnesses? In such a situation, the law has created an instrumentality which offends all sense of justice. That is the situation we have in the case at bar.

VI

THE LOWER COURT'S CHARGE TO THE GRAND JURY WAS ERRONEOUS

Little need be said concerning the charge of the lower court to the grand jury. The subject is thoroughly discussed in the briefs that have heretofore been submitted and we respectfully submit that the opinion of Judge Donworth on this point commands adoption.

VII

THE CONDUCT OF THE PROSECUTORS IN THE GRAND JURY ROOM WAS ERRONEOUS

Little need be said on this point. The unbridled conduct of the prosecutors, if approved by this Court, constitutes a shocking and dangerous precedent which will discredit the judicial system in our State and most certainly will cause the citizens of the State to lose faith in our system of law enforcement.

In this connection it should be observed that both the charge to the grand jury by the lower court and the conduct of the prosecutors constitutes state action which is subject to review by the United States Supreme Court. Can it be doubted that the Supreme Court will consider such conduct to be a violation of the rights of the defendant under the Fourteenth Amendment?

VIII

THE LOWER COURT ERRED IN REFUSING TO GRANT THE APPELLANT'S MOTIONS FOR A CONTINUANCE AND CHANGE OF VENUE

With respect to appellant's motion for a continuance, Judge Hill relies strongly upon the statement of Judge Malcolm Douglas that the defendant could have as fair a trial in December 1957 as he could have in May 1958. In this connection it is significant that Judge Douglas was in Europe during the summer of 1957 and did not personally observe the intense and bitter nature of the publicity which was involved in the hearings of the McClellan Committee. Not having been exposed to this publicity, he was hardly in a position to evaluate the degree of hostility which was engendered toward the appellant during these hearings.

Moreover, the question of whether the hostility toward the defendant might abate to some degree between November and May was

pure speculation; but no reason was ever advanced either by the State or by the lower court for haste in bringing the appellant to trial. Surely, whether or not Judge Douglas was correct in his opinion, the appellant should have been afforded the *chance that* the hostility toward him might decrease during this period of time. The orderly administration of justice would have been damaged in no way by the continuance which appellant requested.

In connection with the observations of Judge Douglas it is interesting to observe that a judge of the very same court has recently demonstrated an extreme attitude of prejudice toward appellant. On January 21, 1960, during the trial in the case of *Wampold vs International Brotherhood of Teamsters* (No. 522002) the following proceedings took place:

"Q—(To Mr. Wampold): What was Mr. Beck's position in the International

Union at the time of this conversation?

A—He was the President, International President.

Q—What was his authority at that time?

A—He was the complete master of the union I would say, without any question.

Q—Did anyone ever refuse to obey his orders?

MR. GATES: This is not relevant.

THE COURT (Judge Hodson): Of course, I have lived in Seattle since 1932. I know what Mr. Beck's position was here. He was not only the complete master of the union; he was the complete master of the city; he dominated the economy of the northwest.

Have you read Ralph Potts' latest book? He speaks in parables but his meaning is clear. As a matter of fact, I think that when they were building the Public Safety Building over here, they had some motor-driven wheelbarrows. If I am not mistaken, they were in the Teamsters Union.

No, I know enough about the personality of Mr. Beck, having known him slightly — I have observed him for 25 years. You just don't argue with him.

Q—When Mr. Beck gave you orders,

either concerning union matters or his personal affairs, what did you do?

MR. GATES: I don't see the relevancy.

MR. GRUNBAUM: They have gone into Beck's personal affairs.

THE COURT: Go ahead. Of course, I know what the answer is but put it in the record.

A—I carried out his instructions.

Q—Without question?

A—Yes."

If a Superior Court judge, sworn to try cases objectively and impartially, (see Canons of Judicial Ethics No. 5 and No. 14) honestly and frankly demonstrates such marked bias and preconception, how can it seriously be argued that jurors in the community were not similarly biased?

Judge Bo dt, the United States District Judge for the Western District of Washington, Southern Division, apparently had no difficulty in recognizing and accepting the fact that public opinion was hostile toward Beck. In the summer of 1957, Beck, together

with several other individuals, were indicted for conspiracy to evade Beck's income tax returns. In October 1957 the defendants other than Beck moved for a severance on the ground that public opinion was so bitterly hostile toward Beck that it would be impossible for the defendants to obtain a fair trial if they were required to be tried at the same time that Beck was tried. In November 1957 Judge Boldt granted this motion so that subsequently the trial of the action was conducted against Beck alone. The trial of the other defendants has been continued indefinitely pending determination by the federal appellate courts of certain important questions of law respecting the question of whether certain receipts of Beck constituted taxable income. Thus Beck was required to go to trial in Seattle within a month of the date that the motion for severance was granted by Judge Boldt on the ground that the prejudice against Beck was so great that

it would affect the right of his co-defendants to obtain a fair trial.

With respect to the motion for change of venue it need only be pointed out that the distinction that Judge Hill make in the case of *State vs Hillman,* 42 Wash. 615, seems extremely tenuous. The quotations from the *Hillman* case at 155 Wash. Dec. 578 are primarily matters of conclusion and opinion. This portion of the affidavit was no more or less capable of being controverted than was the affidavit filed by appellant in support of his motion for change of venue. The fact is that an examination of the affidavit filed in the case at bar will disclose that there were many more facts stated in the affidavit than were stated in the affidavit submitted in the *Hillman* case. The fact that the affidavit in the case at bar incorporated by reference other affidavits and exhibits in the case seems to have been disregarded. These facts and exhibits were not controverted because they were true.

IX

ADMISSION OF STATE'S EXHIBITS NOS. 17 AND 18

The admissibility of Exhibits No. 17 and No. 18 has been extensively discussed in the briefs heretofore submitted in this case, and in oral argument. At the trial the theory upon which the State based its offer of these documents was incomprehensible, as was the theory upon which they were admitted. Appellant in his briefs on appeal was, therefore, obliged to mention every conceivable ground for the introduction of the exhibits, and to discuss each of them by way of a process of elimination. On the day oral argument was heard by this Court, the State advanced a new theory and advised the Court, in response to a question, that the theory now constituted the State's position concerning the admissibility of the documents.

The opinion written by Judge Hill and signed by three other judges adopts the view

that the exxhibits "were admissible as secondary evidence, and the best available to the State of what the appellant's records showed as to the source of the nineteen hundred dollars." 155 Wash. Dec. 565, 586. Although this theory was discussed, together with several others, in appellant's reply brief, we are impelled to entreat the Court to reconsider the question and to do so most solemnly. It is inconceivable to us that this Court, or even a single member thereof, could tolerate the consideration of these exhibits by a jury in a criminal case. Either appellant's counsel have heretofore failed utterly in their presentation of this issue, or, if they have not, the Court has decided to abandon a vitally important fundamental principle of evidence and to treat jurors composed of laymen as being competent to decide, not only the probative value of the evidence properly placed before them, but also the initial question of what matters should be considered

by them at all. In either event, if the opinion for affirmance on this point were to be regarded as creating a precedent, the result would be shocking.

The importance of this issue justifies a brief resume of the facts. Exhibit No. 17 was a photostatic copy of a work sheet prepared more than one year after the sale of the automobile by Carl E. Houston, a certified public accountant then working, as an independent contractor, on appellant's income tax return for the year 1956. In the course of taking information from the loose-leaf journal of financial transactions maintained by Marcella Guiry, appellant's secretary, Houston entered on his work sheet the words and figures "Beck/Callahan $19,000.00" as part of the receipts for February 1956. He discovered his error as to the figure and changed it to $1,900.00 on February 18. This entry on the work sheet referred to, but did not accurately describe, the sale of the Cadillac automobile.

After Exhibit No. 17 (and the original sheet, Exhibit No. 18) were offered by the State, *but before they were admitted into evidence*, appellant waived his privilege against self-incrimination and offered to produce for the court the original loose-leaf journal page. The two exhibits were nevertheless admitted. Appellant thereafter at the first opportunity (during his cross-examination of Houston) did produce Exhibit No. 22, which was identified by both Houston and Mrs. Guiry as being the original record and which was admitted into evidence on the basis of Houston's identification of it. (St. 735, 753, 964). Exhibit No. 22 contained an entry which correctly described the transaction as "Sale Cadillac Auto $1,900.00." The entry, and all others on the page, were in the handwriting of Mrs. Guiry.

It has heretofore been uniformly accepted that secondary evidence is only admissible if the primary evidence which it reproduces would itself be admissible if produced in court.

Wigmore on Evidence (3rd Ed.), § 1188, p. 330. The first question to be answered, therefore, is that of whether the original journal page would have been admissible had it contained an inaccurate description of the automobile transaction. The opinion written by Judge Hill concludes that such an entry "would support an inference of an intention to conceal the real source of the nineteen hundred dollars." With this, we must respectfully but emphatically disagree.

A. The Original Journal Entry Would Not Have Been Admissible Against Appellant

The language from the opinion favoring affirmance quoted immediately above contains two assumptions. The first is that the jury could properly find that an inaccurate entry in the original record was *intentionally* made by the person who kept the record and made the entry. The problem here is that, aside from *intention*, the *fact* of inaccuracy is based upon assumption, not proof. The sec-

ond assumption is that the jury might properly *impute to appellant,* by virtue of an inaccurate entry having been intentionally made by someone else, *a criminal intent* to conceal the real source of the money. This latter assumption we believe to be a markedly erroneous application of the rules of evidence, particularly in a criminal case.

There is not one scintilla of evidence, nor has the State ever contended, that appellant ever gave instructions to Mrs. Guiry with regard to the keeping from day to day of the financial journal. There is no evidence to suggest that he participated in any way in the keeping of the records, or that he had any knowledge whatever of the entries made therein. The evidence is perfectly clear and uncontradicted that Mrs. Guiry was the only person who made the journal entries, and that she did so without supervision. Appellant's main office, in fact, was in Washington, D. C., and he was seldom physically pres-

ent in Seattle. (See St. 666, 732, 734, 736, 754, 964, 965, 1110). Thus, the only possible ground for introducing such an entry against appellant as evidence of wrongful intent is the bare fact that the journal was kept for him by a woman employed as his secretary. Such a purported ground of admissibility is totally repugnant to the established rules of criminal and constitutional law.

The indispensible element of criminal intent is *knowledge* in the mind of the wrongdoer. *United States v. Falcone,* 31 U. S. 205, 85 L. Ed. 128; *Direct Sales Company v. United States,* 319 U. S. 703, 87 L. Ed. 1674; *Lee v. United States* (9 Cir. 1939) 106 F. (2d) 906; *State v. Tembruell,* 50 Wn. (2d) 456. Here, with regard to such a hypothetical inaccurate entry in the journal, knowledge on the part of appellant is not only not proved; it is not even suggested by circumstance to an extent which would permit a jury to infer it. The making of such an entry by Mrs. Guiry, even intention-

ally, with nothing shown to implicate appellant personally in the event, could raise no inference whatever against him in a criminal case. As a distinguished writer has put it, "vicarious liability is a conception repugnant to every instinct of the criminal jurist." Francis B. Sayre, *Criminal Responsibility for Acts of Another,* 43 Harvard Law Review 689, 702. For this reason, the courts have uniformly held that the civil rule that a principal is responsible for the acts of his agent performed within the scope of the latter's authority have no application in criminal law, aside from certain misdemeanors not involving felonious intent. *State v. Woolsey,* 80 Mont. 141, 59 Pac. 826; *People v. Moskowitz,* 196 N. Y. Supp. 634; *Mann v. Townsley,* 226 Pac. 554; *State v. Moss,* 95 Ore. 616, 188 Pac. 702; *State v. Burns,* 215 Minn. 182, 9 N.W. (2d) 518; *State v. Lamperelli,* 141 Conn. 430, 106 A. (2d) 762; *Empire Printing Company v. Roden* (9 Cir.,

1957) 247 F. (2d) 8; *People v. Doble,* 203 Cal. 510, 265 Pac. 184.

The last case cited, *People v. Doble,* is precisely in point. The defendant there was charged with fraudulently over-selling a stock issue. The state introduced books kept by an agent which demonstrated the oversale. The California Supreme Court reversed, stating at 265 Pac. 187:

> "If we admit that Cox was the agent of appellant, this might allow his declaration made within the scope of his agency to be admitted in a civil case, *but human liberty does not rest upon so weak a foundation.* A principal, in order to be held criminally liable, must be shown to have knowingly and intentionally aided, advised or encouraged the criminal act committed by the agent. In the absence of such proof, to this extent, the summary of the books should not have been received as a declaration binding on the appellant . . ."[Emphasis added].

The foregoing has postulated for purposes of argument a situation in which the original records kept by Mrs. Guiry for appellant con-

tained an inaccurate entry. It must be re-emphasized at this point that there was no testimony at the trial from any witness to support or even suggest that such was the case.

B. Exhibits No. 17 and No. 18 Were Not Admissible As Secondary Evidence

Without in any way altering appellant's position that an inaccurate entry in the original journal would not have been admissible against him, we must submit that it is even clearer that Exhibits No. 17 and No. 18 were in no way admissible as "secondary evidence." It is stated in the opinion of Judge Hill, at p. 586, that the exhibits "were admissible as secondary evidence, and the best available to the State *of what the appellant's records showed* as to the source of the Nineteen Hundred Dollars." [Emphasis added].

The opinion goes on to state:

> "Neither does Houston's present opinion, that he made a mistake (based as it

is on his *assumption* of the authenticity of Exhibit No. 22), nullify the inference to be drawn from his original entry on his work sheet, which he believed to be correct *at that time.*" [Emphasis added].

The only witnesses who testified concerning Exhibits No. 17, No. 18 and No. 22 were Houston and Mrs. Guiry. It is implicit in the above-quoted excerpts from the opinion that the testimony of these witnesses laid a foundation for the admission of Exhibits No. 17 and No. 18 as secondary evidence of the contents of some primary document or writing which was not presented in court. A careful re-examination of the record, which we respectfully urge the Court to undertake, reveals that there is *no evidence whatever* to support this position.

The rules governing the admissibility of secondary evidence are clear and well-established:

(1) There must be foundation testimony tending to show that the secondary evidence

accurately reflects the contents of an original document which itself would be admissible if offered. See, e.g., *Marshall v. Commonwealth*, 140 Va. 541, 25 S.E. 329; *Wigmore on Evidence* (3rd Ed.) § 1188, p. 330.

(2) The primary evidence must be unavailable to the party offering the secondary evidence, (for example, outside the jurisdiction, or in the possession of an adverse party who refuses to produce it). See, e.g., *City of Roslyn v. Pavlinovich*, 112 Wash. 306; 32 C.J.S. *Evidence*, § 777.

(3) If an adverse party in possession of primary evidence produces it in court, the use of secondary evidence by the other party is precluded. See, e.g., Am. Jur., *Evidence*, § 446.

None of these requirements was met in the present case. The primary evidence involved is the original journal page containing Mrs. Guiry's entry recording the automobile transaction. That document, if available, was the *only* admissible evidence of its own contents

under the best evidence rule. It was and is the contention of appellant that Exhibit No. 22 was that document. When the State offered Exhibit No. 17 as a purported copy, appellant immediately waived his privilege against the production of the original, offered to produce it in court, and did produce it at the first opportunity. The testimony identifying Exhibit No. 22 and establishing it as the best evidence was compelling, and should have precluded respondent from offering any purported secondary evidence of the contents of the journal page.

The opinion written by Judge Hill refers to the witness Houston's "assumption of the authenticity of Exhibit No. 22." It is respectfully urged that Houston was not making an assumption, but testified positively that the exhibit was the very page from which he had prepared his work sheet.

On cross-examination by appellant's counsel (Houston testified as follows:

"Q—Without referring to the contents of the document or reading the contents of the document, Mr. Houston, tell us what relationship it has to the making of State's Exhibit 17 or 18.

A—It was part of Mr. Beck's records and one of the documents that I examined in preparing my statement.

Q—In preparing 17 and 18?

A—That's right.

Q—Or rather in preparing 18, which is the original?

A—That's right."

(St. 349)

On voir dire examination by Mr. Regal, Houston testified as follows:

"Q—Yes. Do you know that this is the record positively that was in the books in March of 1957?

A—Yes.

Q—How do you know that?

A—It was the original document that I procured when I first started to prepare this statement.

* * *

"Q—You don't know of your own knowledge that this is the same document

that was in the books of March of 1957? You have no way of determining that other than it resembles it?

A—I have no way of proving it. *I am certain it was.*

Q—It resembles it?

A—*It is the same document exactly.*

Q—You are very positive. How are you so positive?

A—*Because I examined it so closely.*" (St. 353-354)

Mrs. Guiry also testified, as pointed out at 155 Wash. Dec. 586, "that she made the entry 'Sale Cadillac Auto $1,900' in the first part of March, 1956; and that she had not seen the ledger or journal sheet in question since March, 1957, until she saw it in the court room."

It also appears that the trial court concluded that there was no evidence from which an inference could be drawn that Exhibit No. 22 was not authentic. The last witness called by appellant was Mr. Regal, the deputy prosecutor, who was asked the following:

"Q—Now, Mr. Regal, I would like to ask you if on December 7, during the progress of this trial, I stated to you that with regard to defendant's Exhibit No. 22 that that exhibit was available to the prosecution and that I would stipulate to its withdrawal so that the prosecution might subject that document to any test regarding ink, erasures, date of paper, or any other sort of a test which the prosecution desires to make, chemical or otherwise? Did I make that statement to you on December 7?"

(St. 734)

In sustaining an objection to this question, the court remarked:

"THE COURT: Immaterial. I think in order to rebut the matter there must be some affirmative evidence from which some inference could be drawn. That is my reason for saying it is immaterial."

(St. 735)

It should also be mentioned that from and after March 1957, Exhibit No. 22 was in the possession first of Kenneth Short and then of Charles S. Burdell, both of whom are attorneys practicing in Seattle. The opinion of

Judge Hill mentions the possibility "that Marcella Guiry prepared a new ledger or journal sheet and substituted it for the original after the grand jury investigation and before the trial." 155 Wash. Dec. 585, 586. The grand jury investigation did not begin until a considerable time after March 1957, and any such criminal act on the part of Mrs. Guiry would, therefore, have had to occur while the document was in the possession of one of the two attorneys mentioned.

The authentication of Exhibit No. 22 was thus thorough and unequivocal. It is, of course, true, as the opinion of Judge Hill points out, that the jury could choose to disbelieve the authenticity of Exhibit No. 22, just as they can choose to disbelieve any testimony or evidence. But the fact remains that no evidence of any kind was introduced to show that Exhibit No. 22 was *not* the true primary document, and the jury's right to disbelieve cannot serve as a substitute for the

foundation evidence which is a prerequisite to the admission of purported secondary documents.

The primary or best evidence in this case was thus not only available to the prosecution but was actually produced and admitted by the court. The opinion of Judge Hill rightly points out, at page 586, that the primary evidence "was a part of the books and records of the appellant, which the State could not subpoena or demand that he produce." Thus, initially, the primary evidence was not available to the State. However, this condition ceased prior to the admission of Exhibits Nos. 17 and 18 when appellant waived his privilege against self-incrimination and offered to produce the original document. As indicated above, it is basic to the best evidence rule that secondary evidence loses all claim to admissibility when the adverse party timely agrees to produce the primary evidence. This rule is applicable in civil and criminal cases alike.

See *Rocchia v. United States,* (9 Cir., 1935) 78 F. (2d) 966 ,970. It would be absurd to place a criminal defendant in a weaker position than a civil litigant with regard to the perils of inaccuracies and copying errors which are involved in secondary evidence. A criminal defendant is entitled to waive his privilege as to real evidence as well as to his own testimony. When appellant here waived the privilege as to the journal page, the State should have been totally precluded from offering secondary evidence, *particularly in the absence of any testimony whatever tending to demonstrate that Exhibit No. 22 was not the true original.* To hold otherwise on this record would be to abolish the requirement that the primary evidence be unavailable.

There remains the first requirement mentioned above for the admission of secondary evidence: That of foundation testimony to establish that the secondary document accurately reflects the contents of an unavailable

primary document. On this score, the testimony of Houston and Mrs. Guiry is not merely insufficient, but is the exact reverse of what is required for such a foundation. Houston did *not* testify that Exhibits Nos. 17 and 18 correctly reflected the contents of an entry in the journal kept by Mrs. Guiry. His testimony was exactly the opposite. He testified positively that Exhibit No. 22 was the identical page from which he took his information in preparing the work sheets. He insisted that this was so throughout extensive examination by counsel for both sides, and concluded that he must have made a mistake (and a very logical one in view of the preceding entry regarding Beck/Callahan) when he listed the Cadillac sale. As to Mrs. Guiry's testimony that Exhibit No. 22 was the original which she prepared in March 1956, the only possible inference to be drawn therefrom is that it was the page with which Houston was working. The record is thus utterly devoid of anything

tending to show that Exhibit No. 17 constituted a secondary copy of a primary document. Instead, all of the testimony is directly to the effect that the entry in Exhibit No. 17 was an *erroneous* transposition of two entries on Exhibit No. 22. It is because of the natural frequency of such errors that the rules restricting the use of secondary evidence have always been stringently applied by the courts. As *Wigmore* points out:

> "As between a supposed literal copy and the original, the copy is always liable to errors on the part of the copyist, whether by wilfullness or by inadvertance; this contingency fully disappears when the original is produced." *Wigmore on evidence,* (3rd Ed.) Vol. IV, p. 318.

It is impossible to imagine how evidence such as this could constitute a foundation for the admission of Exhibits No. 17 and No. 18.

The opinion of Judge Hill states:

> "Neither does Houston's present opinion, that the made a mistake . . . nullify the inference to be drawn from his original entry on his work sheet, which he

believed to be correct *at that time.*" [Emphasis supplied]

Can it be seriously contended that Houston's belief in March 1957 that he had copied the entries correctly is admissible to establish such to be the fact when, in a trial nine months later, he testifies positively that he did *not* copy them correctly? Any statement of belief by him "at that time" (March 1957) would be nothing more than inadmissible hearsay at the trial, utterly devoid of evidentiary value except conceivably for purposes of impeachment. See 98 C.J.S., *Witnesses,* § 628; *State v. Yoakum,* 37 Wn. (2d) 137.

Let us assume that in March 1957, instead of transcribing the journal entries on a work sheet, Houston had read them and then signed a statement for the prosecuting attorney averring that they showed the source of the $1,900 as being a "Beck/Callahan" transaction. Such a written statement would obviously be inadmissible as probative evidence

at the trial. Its only possible usefulness would be to impeach Houston if he testified to the contrary. See *State v. Fliehman,* 35 Wn. (2d) 243; *State v. Thorne,* 43 Wn. (2d) 47.

If in this hypothetical situation the court permitted the hearsay signed statement to be used as evidence against appellant, such a ruling would be identical to one which permits Exhibits No. 17 and 18 to go to the jury in the face of Houston's direct testimony at the trial that they were not correct copies of the original journal sheet.

The opinion of Judge Hill, with reference to its statement that the State was not bound by, nor was the jury obliged to believe, the testimony of Mrs. Guiry, cites *Unosawa v. Wright,* (1954), 44 Wn. (2d) 777. We must urge with all due respect that the citation of this case illustrates the error in this section of the opinion. The *Unosawa* case was simply a trial to the Court in which the trier of the facts disbelieved the plaintiff's evidence on the

merits, branded his claim as improbable, and dismissed the suit. This Court reviewed the record and affirmed. The decision is concerned solely with the weight and sufficiency of the evidence and the propritey of the trial court's findings, not with the admissibility of documents. This distinction isolates what we are convinced after painstaking study is the basic flaw in the present opinion.

(1) It is beyond cavil that the trier of fact is entitled to disbelieve the testimony of any witness and to refuse to accept the genuineness of any document; but

(2) *It is equally incontestible that a document cannot be qualified for admission into evidence by the testimony of witnesses who describe it as not competent on the ground that the trier of fact may disbelieve the witnesses and conclude that the document is competent.*

In the present case, the testimony of Houston and Mrs. Guiry was unqualifiedly to the

effect that Exhibits No. 17 and No. 18 were not competent. It is the theory of Judge Hill's opinion that they were nevertheless admissible because the jury was entitled to disbelieve the witnesses. To the best of our knowledge such a view is without precedent in any court, and it was the grave consequences of such a holding that impelled us to remark at the outset of this section of the brief that, if adhered to, it would constitute an abandonment of a basic exclusionary rule of evidence. To permit the jury to consider documents as to which no scintilla of qualifying foundation evidence has been presented is to abdicate to them the function of ruling upon admissibility. It is of no help to call the matter a question of "weight." Juries will undoubtedly assign whatever weight they see fit to any document before them, whether it is competent or not. If the present holding were adhered to, a ruling like the following hypothetical would be entirely proper:

> "'A' sues 'B' for damages, alleging fraudulent misrepresentation in a real estate sale. The case is tried to a jury. 'A' calls 'B' as an adverse witness, hands him a document purporting to be a map which incorrectly shows the property lines, and asks him if it is not the map which he prepared and showed to 'A' for the purpose of inducing him to buy. 'B' testifies that he did not draw the map, did not show it to 'A' and has never seen it before. The court admits the exhibit on the ground that the jury is not obliged to believe 'B's' testimony, stating that the weight of the exhibit is a question for the jury."

Such a ruling would, of course, be reversed by this Court without hesitation. Yet, it is identical with the present holding which approves the admission of Exhibits No. 17 and No. 18 on the grounds that the jury was en titled to *disbelieve* the testimony of Houston and Mrs. Guiry that the exhibits were *not* secondary evidence of an unavailable primary document.

C. The Admission of Exhibits No. 17 and No. 18 Constituted Prejudicial Error

It must finally be emphasized that these two exhibits were of the utmost importance at the trial. They constituted the prosecution's only purported evidence of concealment. One of the deputy prosecutors conceded that their exclusion from evidence might be fatal to the State's case (St. 701), and they were referred to with vigor in closing argument. Their admission was not merely erroneous but was manifestly prejudicial to appellant.

X

THE PROSECUTION COMMITTED MISCONDUCT IN THE CROSS-EXAMINATION OF THE WITNESS MARCELLA GUIRY.

In view of the crucial importance of Exhibits No. 17 and No. 18 (which had been admitted in evidence on some theory during the course of the State's case) the testimony of Marcella Guiry was of the greatest importance to the defendant, although it prob-

ably would have been unnecessary to call Mrs. Guiry as a witness had it not been for the erroneous admission of Exhibits No. 17 and No. 18. Mrs. Guiry identified Exhibit No. 22 which was the original of the document of which Exhibits No. 17 and No. 18 were said to be "the best available evidence." Exhibit No. 22 is a ledger sheet in which Mrs. Guiry recorded certain personal receipts of Mr. Beck. Exhibits No. 17 and No. 18 are not copies of Exhibit No. 22. They are merely work sheets which were preliminary and rough summaries of certain of the information on Exhibit No. 22. Exhibit No. 22 contains a *correct* entry showing that Beck received the sum of $1,900 in connection with a transaction designated as "Sale of Cadillac." Mrs. Guiry testified that she was a secretary for Beck and that her duties included keeping Beck's personal financial records. She stated that she made all the entries on Exhibit No. 22 (St. 964) and that it was made in February

or March of 1956 shortly after the transaction which is the subject of this indictment took place (St. 965). She then testified that Exhibit No. 22 was in her possession until March 1957 at which time she delivered it to Mr. Kenneth Short, an associate of Mr. Tracy Griffin, who was then representing Mr. Beck (St. 965). This testimony is confirmed by Mr. Short (St. 872). She testified that until the document was shown to her at the trial, she had not seen it at any time since she delivered it to Mr. Short (St. 965). She testified that she did not at any time make any similar document, nor did she ever make any different entry with respect to the entry of February 3, 1956 which was designated as a sale of a Cadillac automobile (St. 965). She testified that after March of 1957, she did not at any time prepare a journal sheet relating to any transaction which took place in the months of January or February 1956 (St. 967). This testimony was significant because it was the

State's position that the entry relating to the sale of the Cadillac had originally been falsified by Mrs. Guiry but that the alleged falsification had been procured *after* the grand jury proceedings which took place in May 1957. Mrs. Guiry testified that she had never seen Exhibits No. 17 or No. 18 and that she had never made an entry designating the receipt of the $1,900 for the sale of the Cadillac as "Beck-Callahan transaction" (St. 967-968).

Incidentally, it is apparent from Mrs. Guiry's testimony that Mr. Beck was absent from Seattle a great deal of the time in the performance of his function as president of the International Brotherhood of Teamsters. This fact is further declared at various points throughout the statement of facts. Accordingly(it cannot be argued that the mere circumstance that Mrs. Guiry was designated as Mr. Beck's secretary or that she maintained his financial records warrants the inference that Beck had any knowledge or gave any

directions concerning the method by which Mrs. Guiry kept or maintained his records. On the contrary, the fact that Mrs. Guiry had authority to endorse checks for Beck and deposit them in his personal bank account demonstrates that he delegated considerable authority to her and that he did not participate in the maintenance of his personal financial records.

At the conclusion of Mrs. Guiry's testimony, Mr. Regal, representing the State, advised the court that he desired to impeach her by showing that she asserted her privilege under the Fifth Amendment at the time she was subpoenaed to testify before the grand jury, although the method and circumstances under which she was required to attend the grand jury session and the question of whether she was given authority to consult her lawyer is a matter of considerable interest but which was not fully disclosed at the trial. Mr. Regal did, however, acknowledge

that "she was subpoenaed and brought in in a hurry" and that she was subpoenaed and appeared forthwith (St. 986). The record of Mrs. Guiry's grand jury testimony indicates that she asked for time to consult an attorney and was told that she had no inherent right to do so prior to her testimony (St. 1008).

Inadvising the court concerning his intention with regard to his proposed interrogation of Mrs. Guiry, Mr. Regal stated (St. 982):

> "... I don't think it is proper under the circumstances that I ask a question that would be objectionable and even though it wouldn't amount to grounds for a mistrial, it would compel the court to sustain the question. I don't think that is proper conduct on the part of counsel under any circumstances."

In response to Mr. Regal's proposed impeachment, the court declared (St. 956):

> "I cannot conceive anytime when the claiming of a constitutional right and privilege has any implication of anything but innocence. Therefore, it does not amount to impeachment. Therefore it is not proper impeachment."

In connection with further argument on the question of the right to impeach Mrs. Guiry, the court again emphatically ruled, concerning Mrs. Guiry's assertion of her privilege that "question should not be asked concerning those questions and answers before the grand jury . . ." (St. 996). In fact, the court advised counsel that the asking of such question would be unconstitutional (St. 998).

In response to this ruling, Mr. Regal stated that: "I realize that Your Honor has ruled on the precise question."

Thereafter the cross-examination of Mrs. Guiry was commenced (St. 1014). Very shortly, counsel commenced to refer to the fact that she had appeared before the grand jury, a matter which was completely immaterial in view of the fact that the court had ruled that it would not permit impeachment of the witness by showing that she had asserted her privilege under the Fifth Amendment (St. 1017-1018). Mr. Regal concluded by showing

Mrs. Guiry State's Exhibit No. 10 (which was apparently an exhibit with respect to which Mrs. Guiry had asserted the privilege) and Mr. Regal then proceeded as follows:

> "Q—Did you see that last summer when you testified before the grand jury?
>
> A—Yes, sir.
>
> Q—Was your answer the same then as it is now regarding this exhibit?
>
> MR. BURDELL: I object to that as improper and immaterial because the Court knows she gave no answer.
>
> THE COURT: Objection sustained." (St. 1019).

The opinion of Judge Hill, and the judges who concurred in his opinion, holds that such conduct on the part of the prosecutor was proper, and that in any event the trial court concluded that the question was not prejudicial.

While commendable for its craft, there can be no question but that the question posed to Mrs. Guiry was a deliberate attempt on the

part of the prosecutor to disclose a fact which the court had clearly ruled was immaterial and improper. The deliberate interrogation of a witness, either directly or indirectly, on a point which the court has ruled to be immaterial is indefensible, and the fact that an objection to the question was sustained does not cure the error. Similarly, the fact that there was only one objectionable question is no defense for such conduct. The jury was conscious of and sensitive to the Fifth Amendment problem, this matter having been disclosed and considered at length during the course of the voir dire examination and the jury doubtless recognized the point which the prosecution was attempting to establish. Insofar as it was necessary for appellant's counsel to raise this question on the voir dire examination (no doubt with the complete approval of the court) this would not authorize misconduct with respect to this subject in the subsequent examination of appellant's wit-

ness. The fact that the objection was sustained does not cure the error. See *State v. Crotts,* 22 Wash. 245; *State v. Belnap,* 44 Wash. 605.

This general subject is covered at length in an annotation in 109 ALR 1088. In this annotation, it is pointed out that similar questions, as well as a series of questions, may well constitute misconduct and it is also pointed out that the sustaining of an objection to an improper question does not cure the error in asking the question. The annotation concludes as follows (p. 1096):

> "In fine, one may say that the extent to which in jury trials, the practice of knowingly asking witnesses improper or prejudicial questions has come to be indulged in, indicates the need for a policy which will make the practice unprofitable. The fact that attorneys have earnestly argued that they are entitled to the 'benefit' before the jury of their opponent's action in objecting to such questions is significant of the extent to which fidelity to the ideal of justice has yielded to the unbridled notion that the adminis-

> tration of the law is a game in which victory belongs to him who is most ingenious in turning the existing rules to his advantage. Verdicts so gained should not be retained. To use the language of the Kentucky Supreme Court, 'no litigant should be permitted to profit by such practice.'"

See also *State v. Yoakum*, 37 Wn. (2d) 137. In the latter case, this Court points out that the mere asking of a question may constitute prejudice, even if objection to the question is sustained.

In Judge Hill's opinion the conduct of the prosecution is justified in part by the assertion that the trial court observed no prejudice. Actually, as the record shows, this was a difficult and strongly contested issue of law. Doubtless no one recalls with any degree of certainty whether the trial court was or was not observing the jury at this point, but the probability is that the court was extremely concerned about the conduct of counsel and that his attention was devoted primarily to

the questions which were being asked by Mr. Regal and the objections which were being made by Mr. Burdell. In any event, the case of *State v. Yoakum, supra,* indicates that where such misconduct occurs, there is no necessity of a specific finding of prejudice to the defendant. Moreover, this conduct on the part of Mr. Regal was but one step in a series of acts by the State which violated the Fourteenth Amendment to the United States Constitution and where violations of that Amendment are shown, it is not necessary for a defendant to assume the burden of establishing prejudice. See, among many other cases, the decision in *State v. Marsh,* 126 Wash. 142.

Moreover, the opinion of Judge Hill itself indicates that the conduct of Mr. Regal did in fact result in prejudice to the appellant. In asserting that Exhibits No. 17 and No. 18 were properly admitted, Judge Hill asserts that the jury was not obliged to believe the testimony of Mrs. Guiry to the effect that Exhibit No. 22

constituted her original entry with respect to the transaction involved in this case and that it correctly described and designated such transaction. If the jury believed Mrs. Guiry's testimony, then Exhibits No. 17 and No. 18 would not have been admissible as secondary evidence because they were not accurate reproductions of the entries on Exhibit No. 22. Only disbelief of Mrs. Guiry could possibly warrant the admissibility of Exhibits No. 17 and No. 18 (and even this would not warrant the admission of these exhibits, because Beck was not shown to have had any connection whatsoever with the making of any one of the three exhibits). But this case cannot be affirmed on the "have your cake and eat it too" theory. An examination of Mrs. Guiry's testimony clearly demonstrates that if the jury did not believe Mrs. Guiry, such disbelief must have resulted from the objectionable question asked by Mr. Regal. This did establish the prejudice which Judge Hill asserts

was lacking, (unless the jury disbelieved Mrs. Guiry simply because of prejudice against Beck and the fact that Mrs. Guiry was a secretary of Beck, in which case it is clear that the motion for continuance should have been granted). On the other hand, if the jury did believe Mrs. Guiry concerning the authenticity of Exhibit No. 22, then Exhibits No. 17 and No. 18 should not have been admitted in evidence. Either the ruling on the admissibility of the exhibits, or the ruling on the conduct of counsel, must have been erroneous. The prosecution cannot proceed in one instance on the theory that Mrs. Guiry committed perjury, thus warranting the admissibility of the exhibits, and in the second instance on the theory that the conduct of counsel did not affect the jury's evaluation of testimony of Mrs. Guiry.

XI

CONCLUSION

In this brief we have not discussed all of the questions which were argued in the briefs heretofore submitted by appellant. By omitting such discussion, we do not intend to abandon those points in connection with reargument or rehearing and we incorporate by reference herein the arguments on these points which were made in appellant's opening brief and reply brief.

Some of the procedures which have been countenanced and approved in the opinion of Judge Hill may reflect upon the fairness of the judicial system and law enforcement procedures of this State. This is particularly apparent from the appendix to Judge Donworth's decision, which includes the interrogation of the witness Verscheuren in the course of the grand jury proceedings. We strongly urge that for the time being, the court order that the opinions in this case not

be printed in the bound volumes of the Washington Reports or the Pacific Reports.

In view of the fact that the Court is equally divided on one more issue, and in view of the importance of several other issues in the case which involve constitutional questions, we request that oral argument be ordered on the petition for rehearing under Rule 50 of the Rules on Appeal, as well as on the petition for reargument under RCW 2.04.170 and Rule 15 of the Rules Peculiar to the Business of the Supreme Court. In view of the fact that an added difficult problem is raised by the equally divided opinions, we believe that oral argument of one hour to each party is necessary and would be of assistance to the Court.

It will be observed that Mr. R. V. Welts, of Mount Vernon, has been joined as counsel for appellant. We believe that the observations and argument of Mr. Welts concerning the

effect of the equally divided opinions may be of considerable assistance to the Court.

Several decisions which may be helpful have been omitted from the foregoing argument. These decisions are as follows:

(1) *Divided Court*

Padgett v. State (Fla. 1928) 116 So. 18. In this case the Supreme Court of the State of Florida, absent a statute on the subject, *reversed,* rather than *affirmed,* a judgment of conviction in the trial court, where the Supreme Court was equally divided.

Larramore v. State (Fla. 1933) 195 So. 732. In this case the Supreme Court of Florida *affirmed,* by a divided court, a judgment of conviction in the trial court, but despite the fact that the court was divided in its *opinion,* all members of the court *decided* that the judgment of conviction should be affirmed. No doubt this Court will refuse to indulge in any such mental gymnastics.

(2) *Due Process*

The following cases contain general definitions of the nature of due process which may be helpful:

> *Mooney v. Holohan,* 294 U. S. 103, 79 L.Ed. 791; *Rochin v. People of California,* 242 U. S. 165, 72 S. Ct. 205, 96 L. Ed. 183, 25 ALR (2d) 1936.

Washington State Constitution, Article I, § 32 provides:

> "A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government."

(3) *Power of United States Supreme Court to determine evidence of discrimination or prejudice.*

The United States Supreme Court has the power to determine whether or not error in the trial court which involves constitutional rights results in discrimination or prejudice, and this power is not affected by local practice or by the findings of the state courts.

Annotation: 94 L.Ed. 856.

Smith v. Texas, 311 U. S. 127, 85 L.Ed. 84, 61 S. Ct. 164.

(4) *Effect of asking objectionable question where objection is sustained.*

Braseth v. Farrell, 56 Wash. 365.

(5) *Grand Jury.*

Effect of misconduct of prosecutors during course of grand jury proceedings.

State v. Montgomery, 56 Wash. 443; 4 *Wharton's* Criminal Law and Procedure (1957) § 1716, p. 480.

Impartiality of grand jurors is required. *Stirone v. United States*, 80 S. Ct. 270.

(6) *Necessity of establishing prejudice where Violation of constitutional right has been established.*

Panksley v. United States (9 Cir. 1944), 145 F. (2d) 558.

As we pointed out in the introduction to this brief it is frequently asserted by attorneys that appellate courts often resort to technicalities, legal fictions, and presumptions. It is said that the application of such

methods of decision is not uniform but varies from case to case depending upon the result which the appellate court desires to obtain. We recognize that all reasoning is subjective and frequently motivated by subconscious influences. The law is not a pure science and no man has the ability to reason with precise objectivity in this tremendously difficult field of human endeavor. But we respectfully submit that the opinion of Judge Hill, which is concurred in by three other judges, lends itself to the charge that a continuous use of nice technicalities and legal fictions have been utilized. We are prompted to say this because of our duty to our client, as well as our duty as officers of this Court, but we do so with full recognition of the fact that our own mental processes may be to a greater or lesser degree subject to a similar criticism. Nevertheless, we most seriously and conscientiously urge that the opinion be reexamined from the point of view of procedure,

not personal views of guilt or innocence. We are firmly persuaded that proper procedure in this case would have permitted the defendant to develop additional facts in which case the verdict of the jury might have been "not guilty."

Respectfully submitted,

CHARLES S. BURDELL
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Seattle 1, Washington

R. V. WELTS
Mt. Vernon, Washington

JOHN J. KEOUGH
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Seattle 4, Washington

Attorneys for Appellant

That with respect to the statements of Judge Hodson, as contained in the brief filed by appellant, affiant avers from personal knowledge that Judge Hodson was in error concerning his belief that motor driven wheelbarrows were operated by members of the Teamsters Union in connection with construction of the buildings referred to by Judge Hodson; that it is true that motor driven wheelbarrows are to some degree used in the construction of buildings, and that in fact some wheelbarrows of this type were used in connection with the construction of the building referred to, but these vehicles are operated by members of the Laborers and Hodcarriers Union and the specific vehicles which were used in connection with the construction of the building referred to by Judge Hodson were operated by members of that Union and that this is the general practice in the industry.

Charles S. Burdell

Subscribed and sworn to before me this 9th day of March, 1960.

Virginia H. Berk, Notary Public in and for the State of Washington, residing at Seattle.

(Notarial Seal)

[fol. 2640] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent,

v.

DAVID D. BECK, also known as DAVE BECK, Appellant.

ORDER DIRECTING RESPONDENT TO FILE AN ANSWER TO A PORTION OF APPELLANT'S PETITION FOR REARGUMENT, PETITION FOR HEARING, AND BRIEF IN SUPPORT THEREOF—April 13, 1960

Appellant having filed his petition for reargument, petition for hearing, and brief in support thereof, it appears

to this court that this petition presents a question of law not heretofore presented in this case; and, a majority of the court concurring,

It Is, Therefore, Ordered that the Clerk of this court mail a copy of appellant's petition to the attorneys for respondent, with a request that they file three copies of an answering brief directed solely to the question of the constitutional right of the Supreme Court of this State to permit a criminal judgment and sentence, based upon a jury verdict, to stand when this court is equally divided for affirmance and for reversal; the answering brief to be filed within fifteen days, and a copy thereof served on counsel for appellant.

For the Court.

Dated this 13th day of April, 1960.

Frank P. Weaver, Chief Justice.

[fol. 2641] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 34636

THE STATE OF WASHINGTON, Respondent,

v.

DAVID D. BECK, also known as DAVE BECK, Appellant.

ORDER GRANTING ORAL ARGUMENT—May 23, 1960

Whereas appellant's petition for rehearing is pending before this court; and

Whereas appellant's petition, respondent's answer thereto, and appellant's reply present a constitutional question not heretofore argued orally before this court; now, therefore, a majority of the court agreeing:

It Is Ordered:

That oral argument directed solely to the question of the constitutional right of the Supreme Court of this state

[fol. 2644] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 34636

THE STATE OF WASHINGTON, Respondent,

v.

DAVID D. BECK, also known as DAVE BECK, Appellant.

ORDER ADHERES TO PER CURIAM OPINION—June 14, 1960

This matter came on for rehearing on this day, the court being equally divided on the merits, one judge having disqualified himself, the majority of the court adheres to the Per Curiam opinion heretofore filed.

Dated this 14th day of June, 1960.

By the Court:

Frank P. Weaver, Chief Justice.

[fol. 2645] ORDER CONTINUING APPELLANT'S CASH BOND ON APPEAL—June 24, 1960 (omitted in printing).

[fol. 2647] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 34636

STATE OF WASHINGTON, Respondent,

v.

DAVID D. BECK, also known as DAVE BECK, Appellant.

PETITION FOR REHEARING—Filed July 13, 1960

Comes Now the Appellant through his attorneys and respectfully petitions this Court for a rehearing in the above entitled case on the following grounds:

1. The Order of June 14, 1960, does not recite the grounds upon which the Court can affirm a criminal case by a four-four decision.

2. The Court has no power to affirm a criminal case by a four-four decision.

3. The Court has not rendered an opinion in conformity with Rule 14 of the Rules Particular to the Business of the Supreme Court, particularly in that the Order of June 14, 1960, was not in fact a per curiam decision.

4. The Court has no authority to render per curiam decisions where, as demonstrated by the Order of June 14, 1960, the decision is not agreed upon by all Judges.

5. The Court failed to pass upon the constitutionality of the power of the Court to affirm a criminal case by a four-four decision under the Constitution of the State of Washington and the Fourteenth Amendment of the United States Constitution.

[fol. 2648] 6. The Order of June 14, 1960, was contrary to Article IV, Section 2 of the Constitution of the State of Washington and Rule 15 of the Rules Particular to the Business of the Supreme Court, in that a majority of five Judges is necessary to render an opinion and that the grounds of the decision were not stated.

In support hereof appellant cites and restates all grounds and authorities heretofore cited including the Memorandum in Support of Motion to Strike filed herewith.

Charles S. Burdell, Logan Building, Seattle 1, Washington, R. V. Welts, Mt. Vernon, Washington, John J. Keough, Central Building, Seattle 4, Washington, Attorneys for Appellant.

[fol. 2649] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 34636

STATE OF WASHINGTON, Respondent,

v.

DAVID D. BECK, also known as DAVE BECK, Appellant.

MOTION TO STRIKE—Filed July 13, 1960

Comes Now the Appellant through his attorneys and respectfully moves this Court for an order striking the Order entered in this case on June 14, 1960.

This motion is based upon the following grounds:

1. The Order of June 14, 1960, does not recite the grounds upon which the Court can affirm a criminal case by a four-four decision.

2. The Court has no power to affirm a criminal case by a four-four decision.

3. The Court has not rendered an opinion in conformity with Rule 14 of the Rules Particular to the Business of the Supreme Court, particularly in that the Order of June 14, 1960, was not in fact a per curiam decision.

4. The Court has no authority to render per curiam decisions where, as demonstrated by the Order of June 14, 1960, the decision is not agreed upon by all Judges.

5. The Court failed to pass upon the constitutionality of the power of the Court to affirm a criminal case by a four-four decision under the Constitution of the State of Washington and the Fourteenth Amendment of the [fol. 2650] Constitution of the United States.

6. The Order of June 14, 1960, was contrary to Article IV, Section 2 of the Constitution of the State of Washington and Rule 15 of the Rules Particular to the Business

of the Supreme Court, in that a majority of five Judges is necessary to render an opinion and that the grounds of the decision were not stated.

Charles S. Burdell, Logan Building, Seattle 1, Washington, R. V. Welts, Mt. Vernon, Washington, John J. Keough, Central Building, Seattle 4, Washington.

[fol. 2651] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 34636

THE STATE OF WASHINGTON, Respondent,

v.

DAVID D. BECK, also known as DAVE BECK, Appellant.

ORDER DENYING PETITION FOR REHEARING AND STRIKING MOTION TO STRIKE—August 22, 1960

Appellant having filed, on July 13, 1960, (a) a petition for rehearing and (b) a motion to strike (being a duplication of the petition for rehearing) an order of this court dated June 14, 1960; and the same having been considered by this Court, and more than a majority of this Court agreeing,

It Is Ordered that said petition for rehearing be and the same is hereby denied; it is further

Ordered that the motion to strike is hereby stricken from the motion calendar.

Dated this 22nd day of August, 1960.

By the Court:

Frank P. Weaver, Chief Justice.

[fol. 2652]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 34636

King County No. 30967

THE STATE OF WASHINGTON, Respondent,

vs.

DAVID D. BECK, also known as DAVE BECK, Appellant.

JUDGMENT—August 22, 1960

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of King County, and upon the argument of counsel, and the Court having fully considered the same and being fully advised in the premises, it is now, on this 22nd day of August, A. D. 1960, on motion of Charles O. Carroll, Esquire, of counsel for respondent, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby *affirmed with costs; and that the said State of Washington have and recover of and from the said David D. Beck, also known as Dave Beck, the costs of this action taxed and allowed at Three hundred sixty-nine and no/100 ($369.00) Dollars, and that execution issue therefor. It is further ordered that the present cash bond of Three Thousand and no/100 ($3,000.00) Dollars, on deposit with the Clerk of the Superior Court, shall remain in full force and effect until such time as the United States Supreme Court shall dispose of his case.* And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

[fol. 2653] [File endo

IN THE SUPREME COURT

N sement omitted]

OF THE STATE OF WASHINGTON

STATE OF WASH 34636

INGTON, Respondent,

DAVID D. BECK, a/k vs.

/a DAVE BECK, Appellant.

ORDER RE TRANSMITTAL OF
THE UNITED STA RECORDS TO SUPREME COURT OF
ES—January 10, 1961

This matter having co e on before the undersigned Chief Justice of the Supre me Court upon the application of the appellant, who is aking a petition for a Writ of Certiorari to the United St tes Supreme Court, and Charles O. Carroll, Prosecuting A torney of King County, Washington, attorneys for respo ndent State of Washington having approved said applica ion, it being considered proper that the original papers a nd documents be inspected by the Supreme Court of the United States in lieu of copies, pursuant to Rule 10(4) Rules of the Supreme Court of the United States, now, there re, it is hereby

Ordered that the Clerk of this court on request of appellant transmit to the Cle rk of the Supreme Court of the United States the original transcript of record on appeal and the statement of fact s herein, duly certified by the Clerk of this court, togeth er with such copies or photostatic copies of exhibits a nd duly certified copies of proceedings in this Court as ap pellant may request by praecipe. It is further

Ordered that the transmittal of the aforesaid papers and documents shall be d one at the expense of the appellant.

[fol. 2654] Done In Chan nbers at Olympia, Washington, this 10th day of January, 1961.

Rob ert O. Finley, Chief Justice.

Presented by:

Edward Hilpert, Jr., Of Ferguson & Burdell, Attorneys for Appellant.

Approved as to Form and Notice of Presentation Waived:

Charles O. Carroll, Prosecuting Attorney for King County, By Joel A. C. Rindal, Deputy.

[fol. 2655] PRAECIPE—January 5, 1961 (omitted in printing).

[fol. 2657]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 34636

STATE OF WASHINGTON, Respondent,

v.

DAVID D. BECK, a/k/a DAVE BECK, Appellant.

CLERK'S CERTIFICATE

State of Washington,
County of Thurston, ss.:

I, Robert Holstein, Clerk of the Supreme Court of the State of Washington, do hereby certify that the foregoing is a full, true and correct transcript of so much of the records and files in the above-entitled cause as I am directed by the Praecipe of Ferguson and Burdell, Attorneys for Petitioner herein, to forward to the Clerk of the Supreme Court of the United States as a part of the record on certiorari.

I further certify that the original transcript; statement of facts; copies of exhibits 17, 18 and 22; and supplemental statement of facts are certified separately.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said Court this 14th day of January, 1961.

Robert Holstein
Clerk of the Supreme Court of the
State of Washington

[SEAL]

[fol. 2658]

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1960.

DAVID D. BECK, Petitioner,

v.

WASHINGTON

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—November 18, 1960

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

January 19th, 1961.

Wm. O. Douglas, Associate Justice of the Supreme Court of the United States.

Dated this 18th day of November, 1960.

[fol. 2659]

SUPREME COURT OF THE UNITED STATES

No. 665, October Term, 1960.

DAVID D. BECK, Petitioner,

vs.

WASHINGTON

ORDER ALLOWING CERTIORARI—April 3, 1961

The petition herein for a writ of certiorari to the Supreme Court of the State of Washington is granted limited

to questions 1, 2, and 3 presented by the petition which read as follows:

"1. Where accusation is by a grand jury indictment, does a person (in this case a member and officer of a labor union who at the time of the grand jury proceedings was the subject of continuous, extensive and intensely prejudicial publicity) have a right under the due process and equal protection clauses of the Fourteenth Amendment to have the charges and evidence considered by a grand jury which was fair and impartial or, at least, which was instructed and directed to act fairly and impartially?"

(a) Where petitioner was a member and officer of a labor union, and where prejudicial and inflammatory charges against him were being widely and intensively disseminated by all news media, did he have a right under the due process and equal protection clauses of the Fourteenth Amendment to have the grand jury impaneled in a manner which would prevent or at least tend to prevent the selection of biased and prejudiced grand jurors?

(b) Was it a denial of due process and equal protection as guaranteed by the Fourteenth Amendment for the Court, in the course of instructing the grand jury, to make statements of an inflammatory nature, prejudicial to petitioner, including a statement that testimony before a United States Senate Committee had disclosed that officers of the Teamsters Union (including petitioner) ". . . had through trick and device, embezzled or stolen hundreds of thousands of dollars of the funds of that union—money which had [fol. 2660] come to the union from the dues of its members . . .!"

(c) Where petitioner's rights under the due process and equal protection clauses of the Fourteenth Amendment violated by inflammatory statements of the prosecutors made in secret session of the grand jury, including statements of disbelief of testimony favorable to petitioner, threats of perjury charges against a witness who gave testimony favorable to petitioner, and other statements of an inflammatory nature prejudicial to petitioner?

"2. Was the petitioner's right to a fair trial, as guaranteed by the due process and equal protection clauses of the Fourteenth Amendment, violated where a timely motion for a continuance was denied, although inflammatory and prejudicial statements concerning petitioner had been widely and intensively disseminated in the press and in national magazines, and through the media of radio and television, commencing prior to the indictment of petitioner and continuing until the date of trial?

"3. Was the petitioner's right to a fair trial, as guaranteed by the due process clause of the Fourteenth Amendment, violated where a seasonable application for a change of venue was denied, although inflammatory and prejudicial statements concerning petitioner had been widely and intensively disseminated in the press and in national magazines, and through the media of radio and television, commencing prior to the indictment of petitioner and continuing until the date of trial?"

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.